Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

TCI MEDIA SERVICES, GREAT NORTHWEST REGION, an entity of unknown type; TCI MEDIA SERVICES, BOISE, an entity of unknown type; UNITED CABLE TELEVISION CORP., a Delaware corporation; TCI COMMUNICATIONS, INC., a Delaware corporation; TELE-COMMUNICATIONS, INC., a Delaware corporation; BRUCE WETTEN, an individual; and EDWARD MOORE, an individual,

Petitioners,

v.

PATRICIA A. COLE, CATHY LEAL, and BECKI TRUEBLOOD,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

With respect to Title VII of the Civil Rights Act of 1964:

1. Did the Ninth Circuit correctly hold that plaintiffs who worked in a deferral state (Idaho), and who knowingly instructed the Equal Employment Opportunity Commission to submit their sex discrimination charges in another state to a local agency which lacked authority to grant or seek the relief sought (City of Seattle Office of Civil Rights), had "filed" their charges with the EEOC within the meaning of 42 U.S.C. § 2000e-5(c)?

With respect to parallel provisions of the Age Discrimination in Employment Act:

2. Did the Ninth Circuit correctly hold that a plaintiff who worked in a deferral state, and who knowingly instructed the Equal Employment Opportunity Commission to submit her age discrimination charges in another state to a local agency which lacked authority to grant or seek the relief sought, had exhausted her administrative remedies under 29 U.S.C. § 633(b)?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding, although some of the captioned defendants are unknown entities that have been incorrectly named to the best of Petitioners' knowledge. *See* Corporate Disclosure Statement, *infra*.

CORPORATE DISCLOSURE STATEMENT

"TCI Media Services, Great Northwest Region" and "TCI Media Services, Boise" have been incorrectly named. There are no actual corporate entities with those names.

United Cable Television Corporation, formerly d/b/a TCI Media Services, is a Delaware corporation, and a wholly-owned subsidiary of United Artists Holdings, Inc.

United Artists Holdings, Inc. is a wholly-owned subsidiary of AT&T Broadband LLC, formerly known as Tele-Communications, Inc.[1] AT&T Broadband LLC is a 100 percent subsidiary of AT&T Corp., a publicly traded company.[2] TCI Communications, Inc., was merged into Tele-Communications, Inc. as part of Tele-Communications, Inc.'s acquisition by AT&T Corp.

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[1] AT&T Broadband LLC also owns 100 percent of the Series A Cumulative Preferred Stock of United Artist Holdings, Inc. The Series B Cumulative Preferred Stock of United Artist Holdings, Inc. is held as follows: United Cable Television Corp.—44 percent, TCI Realty, LLC—8.7 percent, UACC Midwest, Inc.—20.8 percent and TCI of Northern New Jersey, Inc.—26.5 percent. Each of the entities holding the Series B Stock is wholly owned, directly or indirectly, by United Artist Holdings, Inc.

[2] AT&T Corp. is a corporation the stock of which is traded on the New York Stock Exchange. It has more than 1,000 shareholders.

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners herein respectfully petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit, which reversed the entry of summary judgment in Petitioners' favor by the United States District Court for the District of Idaho.

OPINIONS BELOW

The unreported April 8, 2002 Memorandum decision of the Ninth Circuit (CA No. 00-35508) is reproduced as Appendix A. The Order of the Ninth Circuit, entered June 5, 2002, denying Petitioners' petition for panel rehearing is

reproduced as Appendix B. The Mandate of the Ninth Circuit, issued June 13, 2002, is reproduced as Appendix C. The Amended Order and Amended Judgment of the district court, entered May 18, 2000, granting Petitioners' summary judgment motion and dismissing the case is reproduced as Appendix D. The Order of the district court, entered July 19, 2000, denying plaintiffs' motion for reconsideration on summary judgment is reproduced as Appendix E.

STATEMENT OF JURISDICTION

The Ninth Circuit issued a Memorandum decision and entered a Judgment on April 8, 2002, reversing the district court's entry of summary judgment in Petitioners' favor. (App. A.) On April 29, 2002, Petitioners petitioned the Ninth Circuit for a panel rehearing, and on June 5, 2002 the Ninth Circuit issued an Order denying that petition. (App. B.) This Petition is being timely filed within 90 days of that Order. 28 U.S.C.A. § 2101(c) (West 1994); *see* Sup. Ct. Rule 13.3 (petition for writ of certiorari is timely if filed within 90 days of an order by federal circuit court denying petition for rehearing); *Missouri v. Jenkins*, 495 U.S. 33 (1990) (a petition for rehearing suspends finality of circuit court's judgment until it is denied). This Court has jurisdiction in this matter pursuant to 28 U.S.C.A. § 1254(1) (West 1993).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of federal anti-discrimination statutes governing the exhaustion of administrative remedies and the statute of limitations under Title VII of the Civil Rights Act of 1964 ("Title VII"), 78 Stat. 241, 253, as amended, 42 U.S.C.A. § 2000e *et seq.* (West 1994), and the Age Discrimination in Employment Act of 1967 (the "ADEA"), 81 Stat. 602, as amended, 29 U.S.C.A. § 621 *et seq.* (West 1999).

42 U.S.C.A. § 2000e-5(c)

Section 706(c) of Title VII, 42 U.S.C.A. § 2000e-5(c) (West 1994), provides:

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or *authorizing a State or local authority to grant or seek relief from such practice* or to institute criminal proceedings with respect thereto upon receiving notice thereof, *no charge may be filed under subsection [(b)][1] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated*, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(Emphasis and footnote added.)

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[1] The 1972 amended version of this statute erroneously retained the subsection "(a)" reference in the original 1964 Act. As this Court has observed, however, subsection "(b)" is clearly correct. *See EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 111 n.2 (1988).

29 U.S.C.A. § 633(b)

Section 14(b) of the ADEA, 29 U.S.C.A. § 633(b) (West 1999), provides:

> In the case of an alleged unlawful practice occurring in a *State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law*, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

(Emphasis added.)

STATEMENT OF THE CASE

A. Facts Material to the Questions Presented.

1. *Plaintiffs Were Employed in Idaho, Resigned There, and Filed EEOC Charges.*

Respondents Cathy Leal, Becki Trueblood and Patricia Cole (collectively, "plaintiffs") were employed as "account executives" at defendant United Cable Television Corpo ration, formerly dba TCI Media Services ("TCI"), where they sold television advertising spots on TCI Cable to local businesses. (App. D; 8a.) Plaintiffs were hired and served the entire duration of their employment in Boise, Idaho. (*Id.*;

Plaintiffs' Statement of Disputed Facts and Additional Material Facts in Opposition to Defendants' Motion for Summary Judgment ¶ 1, excerpts of which are reproduced as Appendix F; 24a.)

Leal was hired on August 3, 1993 and resigned on October 1, 1997. Trueblood was hired on July 12, 1994 and resigned on June 3, 1997. Cole was hired on July 8, 1996 and resigned on April 4, 1997. (*See* plaintiffs' EEOC charges forms, reproduced as Appendices G-I; *see also* App. D; 8a.)

After they resigned, plaintiffs each submitted charges to the Equal Employment Opportunity Commission (the "EEOC") in the fall of 1997, alleging that their Boise co-worker, defendant Edward Moore, had subjected them to unwelcome sexual harassment in violation of Title VII, and that the TCI's general manager in Boise, defendant Bruce Wetten, had discriminated against them with regard to promotions, pay, and benefits because of their gender in violation of Title VII and the Equal Pay Act, 29 U.S.C.A. § 206(d) (West 1998) (the "EPA").[2] (App. A; 2a; Apps. G–I.) Plaintiff Cole subsequently submitted additional charges to the EEOC in December 1997, alleging that defendants had also discriminated against her on the basis of age in violation of the ADEA. (App. A; 3a; App. I.) The EEOC issued plaintiffs right-to-sue letters on February 10, 1998, reproduced as Appendices J-L.

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[2] References hereinafter to "defendants," collectively, are to all individual and real-entity defendants represented in the action below.

2. *Plaintiffs Instructed the EEOC to Forward Their Charges to a Local Agency with No Subject Matter Jurisdiction.*

a. Plaintiffs Were Aware That the Discriminatory Conduct They Alleged Arose Solely in Idaho.

In the trial court, plaintiffs admitted without reservation that they were hired and employed exclusively in Idaho, and that all of the alleged discriminatory conduct of which they complained took place in Idaho. Paragraph 1 of Defendants' Statement of Material Facts, filed January 28, 2000 (*see* App. F; 24a ¶ 1), states:

> All Plaintiffs have conceded that their entire employment with TCI Media Services took place in Idaho, that they were hired and employed for the entire duration of their employment in the Boise, Idaho office, that they were never employed in Washington or any other state. (Ex. 26 at Responses 2-4) Consequently, all of the alleged claims in the Complaint and in Plaintiffs' EEOC charges were based entirely on acts that took place in Idaho if they occurred anywhere.

Plaintiffs responded in one sentence:

> "1. Plaintiffs do not dispute this fact."

(*Id.*)

b. Plaintiffs, Through Their Attorneys, Took Affirmative Steps to Cause the EEOC to Forward Their Charges to the Seattle Office for Civil Rights.

Plaintiffs were represented by counsel and submitted their EEOC charges through their attorneys.[3] Leal and Trueblood

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[3] *See* correspondence between plaintiffs' counsel and the EEOC's Seattle branch office, reproduced as Appendices M–O.

submitted their Title VII charges to the EEOC office in Seattle. (Apps. G, H.) Cole also submitted her ADEA charges to the EEOC in Seattle.[4] (App. I.) In completing their respective EEOC charges forms, each plaintiff listed her primary employer as "TCI Media Services, 18 West Mercer, Suite 100 Seattle, WA 98119." (Apps. G–I.) In the entry space provided for "State or local Agency, if any," each plaintiff specifically instructed the EEOC to forward her charges to the "Seattle Office for Civil Rights" (the "Seattle OCR").[5] (*Id.*) Plaintiffs did not inform the EEOC that the discriminatory conduct of which they complained in their charges took place entirely in Idaho,[6] nor did they ask the EEOC to forward their charges to the Idaho Human Rights

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[4] Through her former counsel, Cole filed Title VII charges in the fall of 1997 with the EEOC in Seattle, and requested that they be forwarded to the Idaho Human Rights Commission. Through her current counsel, she subsequently amended her charges to include age discrimination and expressly requested that her amended charges be deferred by the EEOC to the Seattle Office for Civil Rights rather than the IHRC. (*See* Apps. M, N.) The exhaustion of administrative remedies and the timeliness of Cole's Title VII charges are not at issue in this Petition. However, Cole's request that the EEOC forward her ADEA charges to the local agency in Seattle, knowing that the IHRC was the appropriate state or local agency through which to exhaust her administrative remedies, is a material fact for purposes of the questions presented.

[5] In the Ninth Circuit, plaintiffs argued that they were entitled to the 300-day statute of limitations in 42 U.S.C.A. § 2000e-5(e)(1) because Washington is a deferral state and the EEOC has a self-executing worksharing agreement with the Washington State Human Rights Commission ("WSHRC"). (*See* Appellants' Opening Brief at 20 n.4.) Plaintiffs did not direct the EEOC to forward their charges to the WSHRC, but even if they had, it would not have meant they exhausted their administrative remedies. Like the Seattle OCR, the WSHRC lacked subject matter jurisdiction, since none of the alleged discrimination took place in Washington. (*See* App. F; 24a. ¶ 1.)

[6] In their EEOC charges forms, plaintiffs described the alleged discriminatory acts, but did not specify where they occurred. (*See* Apps. G–I.)

Commission ("IHRC"). The Seattle OCR did not have jurisdiction to investigate plaintiffs' claims, because it had no "authority to grant or seek relief from" the discrimination alleged by plaintiffs in their charges.[7] 42 U.S.C.A. § 2000e-5(c); 29 U.S.C.A. § 633(b); *see also* generic form of EEOC's Seattle District Office, listing all state and local agencies within that district and providing "Jurisdictional Information for Charging Parties", reproduced as Appendix P; 44a.

B. Course of Proceedings Below.

On May 6, 1998 plaintiffs filed a Complaint in the United States District Court for the Western District of Washington. Defendants moved to dismiss or transfer the case to the district court in Idaho on grounds that plaintiffs' employment and all alleged discriminatory conduct set forth in the Complaint took place in Idaho, if anywhere. Plaintiffs did not contest the motion, but stipulated to the transfer of venue and filed an Amended Complaint in the Idaho district court on November 2, 1998, alleging discrimination claims under Title VII, the ADEA (Cole only), and the EPA. (Apps. A; 2a-3a.) The district court assumed jurisdiction of plaintiffs' federal claims pursuant to 28 U.S.C.A. § 1331 (West 1993). Plaintiffs also alleged several state law claims relating to the same underlying circumstances as their federal claims. (App. D; 15a.)

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[7] The Seattle Municipal Code ("SMC") 14.04 "Fair Employment Practices Ordinances" sets forth the duties, and defines the jurisdiction, of the Seattle OCR. In particular, *see* SMC § 14.04.020, "Declaration of policy" ("The role of the Office for Civil Rights is to enforce the provisions of this chapter in furtherance of this policy."); SMC § 14.04.040, "Unfair employment practices designated" ("It is unfair employment practice *within the City* for any: . . . Employer to discriminate against any person with respect to . . . .") (emphasis added); and SMC § 14.04.060, "Powers and duties of Department" (". . . The Office for Civil Rights shall receive, investigate, and pass upon charges alleging unfair practices *as defined by this chapter* . . . .") (emphasis added).

On January 28, 2000 defendants filed a motion for summary judgment, seeking dismissal of the case on a number of grounds, including failure to exhaust administrative remedies and failure to file timely charges with the EEOC. (*See, e.g.*, Memorandum in Support of Defendants' Motion for Summary Judgment (Docket No. 45), filed January 28, 2000, at 2-4.) On May 18, 2000 the district court entered an Amended Order and Amended Judgment, granting defendants' motion and dismissing the case in its entirety. (App. D.) With respect to the Title VII and ADEA claims, the Court ruled both that plaintiffs had never exhausted their administrative remedies and that they had failed to file timely EEOC charges under the applicable statutes of limitation.[8] (*Id.* at 9a-13a.)

On May 26, 2000 plaintiffs filed a motion for reconsideration or, in the alternative, for a new trial. (App. E.) The district court entered an Order on July 19, 2000 denying that motion. (*Id.*)

Plaintiffs appealed the district court's summary judgment ruling to the Ninth Circuit, which reversed and remanded for further proceedings. (App. A.) The Ninth Circuit applied the 300-day statutes of limitation for the filing of Title VII and ADEA charges,[9] on grounds plaintiffs had "filed with the EEOC in a deferral state [Washington] that has a fair employment practices (FEP) agency." (App. A; 2a.) Finding that plaintiffs had filed their charges with the EEOC within 300 days of the alleged discriminatory acts, the Ninth Circuit held that plaintiffs' charges were timely.[10] (*Id.*)

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[8] The district court also dismissed plaintiffs' EPA claims, a ruling upheld by the Ninth Circuit which is not at issue in this Petition.

[9] *See* 42 U.S.C.A. § 2000e-5(e)(1) (West 1994) and 29 U.S.C.A § 626(d) (West 1999).

[10] The Ninth Circuit also evaluated the record to determine whether there was an issue of fact as to whether Leal stated a claim for

Petitioners' petition for panel rehearing was denied on June 5, 2002. (App. B.)

REASONS FOR GRANTING THE PETITION

Under Supreme Court Rule 10(c), grounds for a writ of certiorari exist when a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court or has decided a federal question in a way that conflicts with applicable decisions of this Court. Review is also appropriate under Rule 10(a) when a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.

As explained below, all of the above-stated grounds for review are present here.

I. THIS CASE INVOLVES AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT.

The questions presented in this Petition raise an important issue concerning the exhaustion of administrative remedies under federal antidiscrimination statutes. Generally stated, the issue is whether an employee who works in a deferral state may "forum shop" in exhausting administrative remedies.

The plaintiffs here worked in a deferral state with an agency fully capable of investigating the charges they alleged (*i.e.*, the IHRC).[11] Believing for whatever reason that they

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constructive discharge, because she resigned several months after defendant Moore had resigned. (App. A; 3a-4a.) That aspect of the Ninth Circuit's decision is at issue in this Petition because Petitioners contend that Leal has not exhausted her administrative remedies.

[11] Cole's Title VII charges were filed with the IHRC, which forwarded them to the EEOC. (App. A; 3a.) The Ninth Circuit expressly found the

might fare better in another forum, however, plaintiffs knowingly directed the EEOC to forward their charges to the Seattle OCR—an agency located in another state that had no connection to any of the discriminatory conduct they alleged.

As noted below, this Court has held that the exhaustion of administrative remedies is a mandatory requirement in Title VII and ADEA cases. It is required by the plain statutory text and is consistent with Congressional intent that state and local agencies be afforded a reasonable opportunity to investigate and attempt to resolve disputes within their jurisdictions before the federal government becomes involved. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755-56 (1979); *Mohasco Corp. v. Silver*, 447 U.S. 807, 820-21 (1980).

However, this Court has liberally construed the *process* by which an employee may clear that statutory hurdle. *See, e.g., EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 121-22 (1988) (administrative remedies are satisfied through state agency's waiver of exclusive 60-day period for initial processing of claim).

Nevertheless, as the Court's recent decision in *National Railroad Passenger Corp. v. Morgan*, 122 S. Ct. 2061 (2002), demonstrates, the liberal leeway that an employee may be afforded in this regard cannot be stretched to the point where such procedural prerequisites as exhaustion of remedies and compliance with statutes of limitation are simply no longer meaningfully enforced.

The Ninth Circuit's decision in this case does just that. It permits a charging party who works in a deferral state to exhaust administrative remedies and obtain the benefit of the 300-day statute of limitations by submitting charges to the EEOC with a request that they be forwarded to *any* state or

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IHRC to be a state agency with subject matter jurisdiction over plaintiffs' Title VII claims. (*See id.*; 3a-4a.)

local forum of the plaintiff's choice, regardless of whether that agency has subject matter jurisdiction with "authority to grant or seek relief" from the alleged discrimination. 42 U.S.C.A. § 2000e-5(c); 29 U.S.C.A. § 633(b). Under the Ninth Circuit's holding, plaintiffs here would have exhausted their administrative remedies by submitting their charges to the EEOC with directions that it defer, for example, to the Virginia Council on Human Rights—a senseless result that would deprive the State of Idaho of its right to assume primary jurisdiction of the dispute.

Plaintiffs failed to exhaust their administrative remedies because the EEOC never had jurisdiction to "file" their charges, since no state or local agency with jurisdiction satisfied the deferral requirement in 42 U.S.C.A. § 2000e-5(c) or 29 U.S.C.A. § 633(b).

This Petition presents an opportunity to resolve an important issue of federal law that this Court has yet to decide precisely, and as to which the federal circuit courts are divided. The Ninth Circuit's overly permissive interpretation of the means by which the plaintiffs in this case were allowed to exhaust their administrative remedies led it to infer exhaustion where none existed. The Court should grant review and hold that employees exhausting administrative remedies may not forum shop by deferring their charges to a state or local agency that has no subject matter jurisdiction over the alleged discrimination. Such a rule is fundamentally unfair to employers, inconsistent with the statutory text and the purpose of exhaustion, and contrary to relevant precedent of this Court and various United States courts of appeals.[12]

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[12] Because they failed to exhaust their administrative remedies, plaintiffs' claims are stale at this point under 42 U.S.C.A. § 2000e-5(e)(1) and 29 U.S.C.A § 626(d). However, this Court has held that the failure to exhaust administrative remedies is a non-jurisdictional defect, and that equitable doctrines such as waiver, estoppel and tolling may apply under extraordinary circumstances. *See Zipes v. Trans World Airlines, Inc.*, 455

A. Exhaustion of Administrative Remedies Is Mandatory, Not Optional.

This Court requires strict compliance with the statutory provisions governing exhaustion of administrative remedies under Title VII and the ADEA.

Section 706(c) of Title VII provides in relevant part that in a deferral state[13]

> no charge may be *filed* under subsection [(b)] of this section by the person aggrieved before the expiration of sixty days after proceedings have been *commenced under the State or local law*, unless such proceedings have been earlier terminated . . . .

(Emphasis added.) *Cf.* Section 14(b) of the ADEA, 29 U.S.C.A. § 633(b).[14]

U.S. 385, 393 (1982). Because no facts would justify plaintiffs' knowing decision to misdirect the EEOC to forward their charges to an agency lacking subject matter jurisdiction, if this Court were to grant review and reverse, Petitioners would contend on remand that plaintiffs' claims should be dismissed with prejudice. *Cf. Burnett v. N. Y Cent. R.R.. Co.*, 380 U.S. 424, 429 (1965) (tolling allowed where plaintiff innocently filed FELA action in wrong venue, but in court "of competent jurisdiction").

[13] A deferral state is defined as:

> [A] State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof . . .

42 U.S.C.A. § 2000e-5(c) (West 1994). *Cf.* 29 U.S.C.A. § 633(b) (West 1999).

[14] In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979), this Court observed:

> Since the ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace, since the language of § 14(b) is almost *in haec verba* with § 706(c), and since the legislative history of § 14(b) indicates that its source was § 706(c),

"Under Title VII . . . state fair employment practices agencies have *primary jurisdiction* over employment discrimination complaints." *Del. State Coll. v. Ricks*, 449 U.S. 250, 254 (1980) (emphasis added) (citing 42 U.S.C. § 2000e-5(c)). (*See also* App. P; 44a.) Congress included the exhaustion requirement "to screen from the federal courts those problems of civil rights that could be settled . . . in 'a voluntary and localized manner.'" *Mohasco*, 441 U.S. at 755 (quoting 110 Cong. Rec. 12725 (1964) (remarks of Sen. Humphrey)). A deferral state with an agency capable of granting or seeking relief from the discrimination alleged has the right to assume jurisdiction and investigate in the first instance. *Id.* at 755 (Section 706(c) "is intended to give state agencies a limited opportunity to resolve problems of employment discrimination and thereby to make unnecessary, resort to federal relief."). This Court has stressed, therefore, that the exhaustion of administrative remedies is an absolute requirement before an employee's charges can even be "filed" with the EEOC:

> [S]ubsection [706](c) . . . imposes a special requirement for cases arising in deferral States: "no charge may be *filed* under subsection [(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated . . . ." Thus, in terms, *the statute prohibited the EEOC from allowing the charge to be filed* on the date the letter was received. Although, as the Court held in *Love v. Pullman Co.*, *supra*, it was proper for the EEOC to hold

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we may properly conclude that Congress intended that the construction of § 14(b) should follow that of § 706(c).

Given the nearly identical construction that this Court has accorded provisions in Title VII and the ADEA relating to the exhaustion of administrative remedies, this Petition will provide a more comprehensive discussion of Title VII authorities and provide parallel citations to the ADEA, where appropriate.

> respondent's "complaint in 'suspended animation,' *automatically filing it upon termination of the State proceedings*," 404 U.S., at 526, 92 S.Ct., at 618 (emphasis added), that means that the charge was *filed* on the 351st day, not the 291st. By that time, however, the 300-day period had run and the filing was therefore untimely.

Mohasco, 447 U.S. at 817 (footnote omitted; italicized emphasis and third brackets in original; other emphasis and brackets added); *accord Oscar Mayer*, 441 U.S. at 758 (construing the parallel provision under the ADEA and holding "that under § 14(b) of the ADEA, as under § 706(c) of Title VII, resort to administrative remedies in deferral States by individual claimants is mandatory, not optional.").[15]

B. The Process Through Which an Employee Is Allowed to Comply with Exhaustion of Administrative Remedies Has Been Liberally Construed.

The exhaustion requirement is mandatory. Satisfaction of that requirement, though, is intended to be a simple process in most instances. Beginning with *Love v. Pullman Co.*, 404 U.S. 522 (1972), and consistent with the remedial purposes of federal anti-discrimination statutes, this Court has historically interpreted provisions relating to the exhaustion of remedies in a manner that imposes a minimal burden upon the complainant. Some examples are illustrative and important because, unlike the Ninth Circuit's decision here, they have

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[15] Similarly, compliance with the statutes of limitation in Title VII is strictly enforced, *see Morgan*, 122 S. Ct. at 2070 (this Court has stated that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.") (Quoting *Mohasco*, 447 U.S. at 826 (construing the ADEA)), subject only to excuse based equitable considerations, "to be applied sparingly." *Morgan*, 122 S. Ct. at 2072, 2076; *accord Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

never negated the basic statutory requirement that state or local administrative remedies must be exhausted before charges can be "filed" with the EEOC under section 706(c) of Title VII and section 14(b) of the ADEA.

1. The EEOC itself may initiate the local proceeding in a deferral state on behalf of the charging party; the charging party is not necessarily required to do it. *Love*, 404 U.S. at 525. In addition, the EEOC may commence the state proceedings by forwarding the charges orally, rather than in writing. *Id.*

2. When a plaintiff who works in a deferral state submits charges to the EEOC, and the EEOC forwards them to a state agency with subject matter jurisdiction (the missing link in the present case), the charges are "initially instituted" with the state agency, rather than the EEOC, for purposes of triggering the 300-day statute of limitations in 42 U.S.C.A. § 2000e-5(e)(1). The EEOC is jurisdictionally precluded by Section 2000e-5(c) from "filing" the charges until the state or local agency with primary jurisdiction conducts its own investigation for 60 days, or earlier terminates it. *Mohasco Corp. v. Silver*, 447 U.S. at 817; *Oscar Mayer*, 441 U.S. at 758; *Ricks*, 449 U.S. at 254 (state agency has "primary jurisdiction").

3. Charges "commenced" with an appropriate state or local agency under Section 2000e-5(c) need not be timely under the state's limitations period for the EEOC thereafter to assume jurisdiction, "file" the charges, and proceed with its investigation, provided that the charges are otherwise timely within the 300-day limitations period in Section 2000e-5(e)(1). When the limitations period has run under state law, the charging party has satisfied both the "commencement" of state proceedings and the "earlier terminated" requirements of Section 2000e-5(c), which transfers jurisdiction to the EEOC, and the charges are "filed." *Oscar Mayer*, 441 U.S. at 758.

4. Worksharing agreements between state or local fair employment practices ("FEP") agencies and the EEOC permit the agencies to serve as reciprocal agents for the submission of charges. Such agreements allow the FEP agencies to waive conditionally the 60-day period of primary jurisdiction, permitting the EEOC to assume jurisdiction under Section 2000e-5(c) and immediately "file" the charges. This triggers the 300-day limitations period in 2000e-5(e)(1), with the FEP agency retaining jurisdiction to pursue the matter further, should federal intervention fail to resolve the dispute. *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107.

C. The Ninth Circuit's Decision Is Contrary to the Plain Meaning and Purpose of the Exhaustion Requirement in Title VII and the ADEA.

The Ninth Circuit's extraordinarily permissive interpretation of Section 706(c) of Title VII and Section 14(b) of the ADEA nullifies the exhaustion of remedies and deprives state and local agencies of their primary jurisdiction. Under the plain and unambiguous meaning of those provisions, plaintiffs never exhausted their administrative remedies. Rather, they intentionally caused the EEOC to refer their charges to a local agency that lacked subject matter jurisdiction to investigate and take any action with respect to their charges. It is undisputed that the Seattle OCR had no "authority to grant or seek relief" from the solely Idaho-based discriminatory practices alleged in plaintiffs' charges. 42 U.S.C.A. § 2000e-5(c); 29 U.S.C.A. § 633(b). The only evidence in the record indicates that plaintiffs were fully aware that the IHRC was the only state or local agency with primary jurisdiction, and misinformed the EEOC so it would not forward the charges to the IHRC.

The Ninth Circuit did not construe or rely upon the existence of a worksharing agreement between the EEOC and any other agency, either in Washington or Idaho. Nor could

it do so, because no such agreement was in the record. Instead, the Ninth Circuit said simply that since plaintiffs worked in a deferral state (Idaho) and submitted charges in another deferral state (Washington) that has an FEP agency, plaintiffs had exhausted their administrative remedies and were entitled to "file" their charges with the EEOC within the 300-day limitation period. (App. A; 2a-3a.) The Ninth Circuit opinion does not even mention which FEP agency in Washington supposedly supplied the requisite waiver of primary jurisdiction that would have to precede filing of plaintiffs' claims by the EEOC. (*Id.*)[16] Nothing in the text of Section 706(c) of Title VII or Section 14(b) of the ADEA authorizes claimants effectively to abrogate the exhaustion requirement that must be met before charges can be "filed" with the EEOC.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER UNITED STATES COURTS OF APPEALS.

The decision of the Ninth Circuit conflicts with decisions of other federal circuit courts involving charging parties who have been at fault or responsible for the failure to exhaust their administrative remedies through an FEP agency with subject matter jurisdiction.

In its determination that local remedies were exhausted sufficiently to confer EEOC agency jurisdiction to "file" the charges, the Ninth Circuit ignores FEP agency jurisdiction and jumps to the next inquiry: timeliness of the plaintiffs' federal claims under the applicable statute of limitations. By contrast, other circuits hold that at-fault failure to defer

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[16] The point is that no Washington FEP agency could perform that function, because no Washington FEP agency would have jurisdiction.

charges through an FEP agency with jurisdiction deprives the EEOC of agency jurisdiction to "file" the charges, a failure to exhaust which renders the claims technically time-barred. In those circumstances, the only other question the circuit courts address is whether the plaintiff's failure to exhaust is subject to equitable excuse under doctrines such as tolling, waiver and estoppel. The Ninth Circuit's approach, to eliminate those inquiries out of hand, stands in contrast to that of the other circuits.

Here, the Ninth Circuit accorded no effect to the lack of local agency jurisdiction in the Seattle OCR with respect to plaintiffs' charges. It found exhaustion of remedies notwithstanding plaintiffs' misdirection to the EEOC that it defer the charges to an FEP agency with no authority to grant or seek relief from the alleged discrimination. The Ninth Circuit impermissibly assumed the EEOC had jurisdiction to "file" plaintiffs' charges and then applied the 300-day statutes of limitation under Title VII and the ADEA claim to determine whether plaintiffs' federal court filings were timely. Specifically, the Ninth Circuit held:

> Because [plaintiffs] filed with the EEOC in a deferral state that has a fair employment practices (FEP) agency,[1] they were entitled to 300 days. *Laquaglia v. Rio Hotel & Casino, Inc.*, 186 F.3d 1172, 1174 (9th Cir. 1999); *Bouman v. Block*, 940 F.2d 1211, 1220 (9th Cir. 1991) (if the EEOC transmits the charge to the FEP agency during the deferral period, the 300-day period applies); 19 C.F.R. § 1601.13(a)(4)(ii) (if the FEP agency has waived its period of exclusive processing, the charge is "deemed filed" with the EEOC upon receipt of the document and the 300-day period applies.

[1] Both Washington and Idaho are both deferral states with FEP agencies. 29 C.F.R. §§ 1601.71, 1601.80.

(App A; 2a & n.1.)

The Ninth Circuit, alone among the circuit courts, fails to acknowledge that agency jurisdiction is fundamentally different from the jurisdiction of the federal district courts. The EEOC and state and local agencies are creatures of statute with statutorily defined jurisdiction. The statutes, 42 U.S.C.A. § 2000e-5(c) and 29 U.S.C.A. § 633(b), are explicit: the EEOC can assume subject matter jurisdiction only after a state or local agency with subject matter jurisdiction has investigated for 60 days or has earlier terminated its proceedings. The state or local agency has jurisdiction to satisfy the deferral prerequisite to EEOC jurisdiction only if it has "authority to grant or seek relief" from the alleged discrimination. *Id.* Exhaustion of remedies is therefore determined through strict adherence to agency jurisdiction.

By contrast, federal *courts* have inherent discretionary equitable powers that the EEOC and FEP agencies do not. This Court has specifically ruled that the failure to comply with the procedural prerequisites of Title VII or ADEA claims before filing a lawsuit is non-jurisdictional and is subject to tolling. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Equitable principles may in extra-ordinary circumstances excuse compliance with exhaustion requirements. *See, e.g., Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147 (1984); *Burnett*, 380 U.S. 424; *Miller v. Int'l Tel. & Tel. Corp.*, 755 F.2d 20 (2d Cir. 1985). For this reason, while the issue of whether exhaustion has occurred is determined solely as a matter of agency jurisdiction, the district court's jurisdiction remains a matter of equitable discretion, even when administrative remedies have not been exhausted.

The Ninth Circuit erred because it applied the statute of limitations when exhaustion had not occurred, through the lack of local agency jurisdiction in the Seattle OCR. When, as here, the plaintiffs "forum shop" by directing the EEOC to defer charges to a state or local agency that the plaintiffs

know to be without jurisdiction, the statute of limitations is not an issue, because it will always be exceeded unless the proper FEP agency can be timely notified. Tolling and equitable considerations are the only means by which the claims can be saved.

By leaping over the requisite exhaustion inquiry or presuming exhaustion by deferral to an FEP agency that lacked jurisdiction, the Ninth Circuit's decision conflicts materially with the following circuit court decisions, which do make the exhaustion inquiry and discuss tolling issues when plaintiffs are at fault for failing to exhaust remedies through an FEP agency with jurisdiction.

Citicorp Person-to-Person Fin. Corp. v. Brazell, 658 F.2d 232 (4th Cir. 1981). The Fourth Circuit held that the plaintiff's claim was time-barred because neither the plaintiff nor the EEOC had forwarded her charges to the appropriate FEP agency, and the EEOC had failed to do so because plaintiff had misrepresented that she had forwarded, or soon would forward, the charges to the FEP agency herself. The court found no justification for applying any principles of tolling when the mistake was the plaintiff's, and not that of the EEOC or the defendant.

Cornett v. AVCO Fin. Servs., 792 F.2d 447 (4th Cir. 1986). The Fourth Circuit upheld dismissal of the plaintiff's ADEA claim for failure to exhaust administrative remedies. The EEOC mistakenly had forwarded the plaintiff's charges to a local agency in another state that had no jurisdiction, but provided notice of the transfer to the plaintiff. The court declined to apply tolling, because the plaintiff sat on his rights and failed to inform the EEOC that it had directed his charges to the wrong FEP agency.

Maynard v. Pneumatic Prods. Corp., 256 F.3d 1259 (11th Cir. 2001). The plaintiff's EEOC charges were held to be untimely because (1) they were filed 292 days after the alleged discrimination occurred, (2) the plaintiff did not file

with an FEP agency, (3) only a worksharing agreement might have allowed the FEP agency to waive its primary jurisdiction under Section 706(c), and (4) the record contained no worksharing agreement.

To summarize: In the Ninth Circuit and no other, discrimination claimants may satisfy the statutory requirement of state or local administrative exhaustion by directing EEOC deferral to FEP agencies that lack jurisdiction to grant or seek relief, effectively nullifying the deferral process. In other circuits a charging party who thwarts timely state or local exhaustion through his or her own fault has abrogated federal protection. The Ninth Circuit excuses a claimant from the statutorily mandated exhaustion requirement, even if the claimant effectively induces the failure.

CONCLUSION

For the foregoing reasons, Petitioners respectfully urge this Court to grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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August 30, 2002

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed April 8, 2002]

No. 00-35508
D.C. No. CV-98-00342-EJL

PATRICIA A. COLE, *et al.*,
Plaintiffs-Appellants,

v.

TCI MEDIA SERVICES, GREAT NORTHWEST REGION,
an entity of unknown type, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, Chief District Judge, Presiding

Argued and Submitted March 8, 2002 Seattle, Washington

MEMORANDUM [*]

Before: ALARCÓN, SILVERMAN, *Circuit Judges*, and TEILBORG, *District Judge* [**]

Patricia Cole, Cathy Leal and Becki Trueblood appeal the district court's summary judgment dismissal of their

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[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

[**] The Honorable James A. Teilborg, United States District Judge for the District of Arizona, sitting by designation.

complaint alleging violations of Title VII, the Equal Pay Act (EPA) and the Age Discrimination in Employment Act (ADEA) against TCI Media Services, Bruce Wetten and Edward Moore. The district court found that appellants had not filed timely charges with the EEOC and rejected the EPA claim and Leal's constructive discharge claim on the merits.

We have jurisdiction pursuant to 28 U.S.C. § 1291 and review the district court's grant of summary judgment de novo. *Balint v. Carson City*, 180 F.3d 1047, 1050 (9th Cir. 1999) (en banc). We affirm in part, reverse in part and remand for further proceedings. Because the parties are familiar with the facts, we recite them only as necessary to this decision.

Appellants first argue that they were entitled to the 300-day limitation period so their charges were timely filed with the EEOC. We review the district court's holding that the claims are barred by the Title VII statute of limitations de novo. *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1175 (9th Cir. 2000). We find that all three appellants were entitled to the 300-day period. Appellants' filings of charges in Idaho and Washington were proper. *See* 29 C.F.R. §§ 1601.8 and 1626.5. Leal and Trueblood filed their charges directly with the EEOC no later than October 15, 1997, when the EEOC acknowledged receipt of their signed declarations that were the equivalent of charges. *See* 29 C.F.R. § 1601.12(b); *Cf. Casavantes v. California State University, Sacramento*, 732 F.2d 1441, 1443 (9th Cir. 1984) (a completed EEOC intake questionnaire constitutes a charge). Because appellants filed with the EEOC in a deferral state that has a fair employment practices (FEP) agency,[1] they were entitled to 300 days. *Laquaglia v. Rio Hotel & Casino, Inc.*, 186 F.3d 1172, 1174 (9th Cir. 1999); *Bouman v. Block*, 940 F.2d 1211, 1220 (9th

[1] Both Washington and Idaho are both deferral states with FEP agencies. 29 C.F.R. §§ 1601.71, 1601.80.

Cir. 1991) (if the EEOC transmits the charge to the FEP agency during the deferral period, the 300-day period applies); 29 C.F.R. § 1601.13(a)(4)(ii) (if the FEP agency has waived its period of exclusive processing, the charge is "deemed filed" with the EEOC upon receipt of the document and the 300-day period applies).

Cole filed her charge with the Idaho Human Rights Commission on November 24, 1997 and that agency transmitted the charge to the EEOC for processing on December 12, 1997. Her charge was "deemed filed" with the EEOC on December 12, 1997 and the 300-day period applies to Cole. *Id.* § 1601.13(b). Cole's counsel faxed and mailed the letter and declaration adding the ADEA claim to the charge on December 31, 1997. Thus, the ADEA charge was filed on December 31, 1997. 29 C.F.R. §1626.7; *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 675 (9th Cir. 1988) (an ADEA charge is not filed until the claim is added to the charge).

Because appellants were entitled to the 300-day limitations period, their claims were timely and the district court erred in dismissing the complaint as time-barred.

Appellants argue that the district court erred in dismissing their EPA claims because they failed to prove a prima facie case. Although appellants came forward with sufficient evidence to raise a genuine issue of material fact regarding pretext, they failed to come forward with evidence to establish that TCI paid different wages to males for substantially equal work. *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986). Thus, summary judgment was proper on the EPA claims.

Leal argues that the district court erred in dismissing her constructive discharge claim because Moore, the cause of the hostile work environment, left the company months before Leal quit. We agree. Leal alleged in her charge and came

forward with evidence that her supervisor, Wetten, created much of the hostile environment and Wetten remained Leal's supervisor until Leal's resignation. Thus, Leal came forward with sufficient evidence to raise a genuine issue of material fact of whether the hostile environment and discrimination continued until the date of her resignation. *Cf. Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1108 (9th Cir. 1998) (holding that failure to offer facts regarding incidents after a certain date did not justify summary judgment because plaintiff's statement during her deposition that the conduct persisted for most of her term of employment created a genuine issue of material fact).

AFFIRMED in part, REVERSED in part and REMANDED. Each party shall bear its own costs on this appeal.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed April 8, 2002]

No. 00-35508
D.C. No. CV-98-00342-EJL

PATRICIA A. COLE, *et al.*,
Plaintiffs-Appellants,

v.

TCI MEDIA SERVICES, GREAT NORTHWEST REGION,
an entity of unknown type, *et al.*,
Defendants-Appellees.

ORDER

Before: ALARCÓN and SILVERMAN, *Circuit Judges*, and TEILBORG, *District Judge* [1]

Appellees' Petition for Rehearing is DENIED.

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[1] The Honorable James A. Teilborg, United States District Judge for the District of Arizona, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed April 8, 2002]

NO. 00-35508
CT/AG#: CV-98-00342-EJL

PATRICIA A. COLE; CATHY LEAL; BECKI TRUEBLOOD,
Plaintiffs-Appellants,

v.

TCI MEDIA SERVICES, GREAT NORTHWEST REGION, an entity of unknown type; TCI MEDIA SERVICES, BOISE, an entity of unknown type; TCI COMMUNICATIONS, INC., an entity of unknown type; BRUCE WETTEN, an individual; EDWARD MOORE, an individual; UNITED CABLE TELEVISION CORP., a Delaware corporation; TELECOMMUNICATIONS, INC., a Delaware corporation,
Defendants-Appellees.

Appeal From the United States District Court
for the District of Idaho (Boise).

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Idaho (Boise) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

[Filed May 18, 2000]

Case No. CV98-342-S-EJL

PATRICIA A. COLE, CATHY LEAL, AND BECKI TRUEBLOOD,
Plaintiffs,

vs.

TCI MEDIA SERVICES, GREAT NORTHWEST REGION, an entity of unknown type; TCI MEDIA SERVICE, Boise, an entity of unknown type; UNITED CABLE TELEVISION CORP., a Delaware Corporation; TCI COMMUNICATIONS, INC., a Delaware corporation; TELECOMMUNICATIONS, INC., a Delaware corporation; BRUCE WETTEN, an individual; and EDWARD MOORE, an individual,

Defendants.

AMENDED ORDER

Plaintiffs Patricia A. Cole, Cathy Leal and Becki Trueblood, all former employees of TCI Media Services, bring this lawsuit against TCI, *et al.*, alleging claims under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act ("ADEA"), the Equal Pay Act ("EPA"), and various state law causes of action. TCI moves for summary judgment on all Plaintiffs' claims. The motion is now ripe. Having fully reviewed the record, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be

significantly aided by oral argument, this matter shall be decided on the record before this Court without a hearing.

UNDISPUTED FACTS

The Plaintiffs were employed in TCI's Boise, Idaho office as account executives, to sell television advertising spots on TCI cable to area businesses. Plaintiff Cole was hired as an account executive on July 8, 1996, and resigned on April 7, 1997. Plaintiff Leal was employed as an account executive from August 3, 1993 until she resigned on October 1, 1997. Plaintiff Trueblood began working as an account executive on July 12, 1994, and resigned on June 3, 1997. Defendant Bruce Wetten, acting in his capacity as General Manager, supervised the Plaintiffs during their employment. At the same time that Plaintiffs worked for TCI, Defendant Edward Moore also was an employee of TCI, first as an account executive, then as a senior account executive and finally as a team leader. Moore tendered his resignation to TCI on March 31, 1997, and it was accepted on April 18, 1997.

DISCUSSION

Plaintiffs generally allege that they were "subjected to repeated and continual sexual harassment and treated differently because of their gender." (Pls.' Mem. in Opp'n at 1). They specifically allege that Moore "continually repeated offensive conduct in the work place," such as inappropriate touching, and that Wetten knew of Moore's inappropriate behavior but did not inform his superiors. (*Id.* at 2). Plaintiffs additionally allege that Wetten managed his female employees in a demeaning manner and gave preferential treatment to men when handing out promotions and assigning accounts. Cole also alleges she was discriminated against because of her age, and all Plaintiffs assert several claims arising under state law causes of action as well.

TCI denies the Plaintiffs' charges and moves for summary judgment on all the claims. Summary judgment is

appropriate if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. *Summers v. A. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997).

1. Title VII Claims

Viewing the allegations contained in the Complaint in a light most favorable to the Plaintiffs, they appear to allege three distinct claims under Title VII: 1) disparate treatment, 2) hostile work environment, and 3) constructive discharge. TCI contends that all these claims are time-barred by the limitations period prescribed by Title VII. (Def.'s Mem. in Supp. at 2-4; Def's Reply at 2-5). In this regard, TCI notes that Plaintiffs were required to file a timely charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). To be "timely" under Title VII "a complainant [must] file a charge with the EEOC within 180 days of the last act of alleged discrimination, unless the complainant initially institutes proceedings with a state or local agency, in which case the EEOC charge must be filed within 300 days." *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1176 (9th Cir. 2000). Here it is undisputed that all the alleged events supporting Plaintiffs' claims occurred in Idaho. Therefore, the Idaho Human Rights Commission ("IHRC") is the state or local agency with which the Plaintiffs could "initially institute[] proceedings." *See* 42 U.S.C. § 2000e-5(e)(1) (stating that the relevant state or local agency is the one that has the "authority to grant or seek relief from such [unlawful employment] practice"). However, Plaintiffs do not contend, and the record does not disclose, that any charge was filed with the IHRC. Accordingly, Plaintiffs must show that they filed a charge with the EEOC within 180 days "after the alleged unlawful employment practice occurred." *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1107 (9th Cir. 1998).

The record shows that Plaintiffs' charges were received by the EEOC on December 16,1997. (Additional Aff. of Gregory C. Tollefson, Exs. 88 & 173; Aff. of Gregory C. Tollefson in Supp. of Reply, Ex. C).[1] Thus, to be timely the Plaintiffs' charges must include an allegation of an unlawful employment practice that occurred within the 180 day period running from June 19, 1997 to December 16, 1997. *See Draper*, 147 F.3d at 1107.

The record clearly demonstrates that neither Cole's nor Trueblood's charges are timely. The last unlawful employment practice alleged by Cole occurred on April 4, 1997, when she claims she was constructively discharged. (*See, e.g.*, Additional Aff. of Gregory C. Tollefson, Ex. 88 (Charge of Discrimination and Compl. at 2)). Similarly, the last unlawful employment practice alleged by Trueblood occurred on June 3, 1997, when she claims she was constructively discharged. (*See, e.g.*, Additional Aff. of Gregory C. Tollefson, Ex. 175 (Decl. of Trueblood in Supp. of Charge of Discrimination at 1)). Because the last unlawful employment practice alleged by Cole and Trueblood occurred prior to June 19, 1997, and therefore more than 180 days prior to the filing of their charges with the EEOC, the Title

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[1] The charges of discrimination made by Leal and Trueblood were stamped as "received" by the EEOC on December 16, 1997. (Additional Aff. of Gregory C. Tollefson, Ex. 173; Aff. of Gregory C. Tollefson in Supp. of Reply, Ex. C). For the purpose of resolving the Present motion, the Court will deem the date a charge was "received" as also the date the charge was "filed." There is no record evidence to show that Cole's charges ever were received by the EEOC. (*See, e.g.*, Additional Aff. of Gregory C. Tollefson, Ex. 88). Resolving all possible inferences in Cole's favor, the Court will assume that Cole's charge of discrimination also was "filed" with the EEOC on December 16, 1997.

VII claims of Cole and Trueblood are untimely and barred by the statute of limitations.[2] *See Santa Maria*, 202 F.3d at 1176.

With regard to Leal's charges, and addressing each of her Title VII claims individually, there is no evidence of an unlawful employment practice to support Leal's disparate treatment claim that occurred after June 19, 1997. Leal's claim of disparate treatment is based on her allegations that 1) TCI discriminated against women with regard to promotions, and 2) TCI discriminated against women with regard to the assignment of accounts. All the evidence that Leal points to with respect to the promotion charges are events that transpired prior to June 19, 1997. (*See* Pls.' Statement of Disputed Facts ¶ 54; Aff. of Bruce Wetten ¶¶ 7, 9). Likewise, the evidence cited in support of the charges concerning account assignments involve events that occurred before June 19, 1997. (Pls.' Mem at 9, 10; Pls.' Statement of Disputed Facts ¶55). And the "direct evidence of discriminatory animus" that Leal relies on also relates to statements made prior to June 19, 1997. (Pls.' Mem. at 8-9; Pls.' Statement of Disputed Facts ¶ 56). Accordingly, the charges filed by Leal with the EEOC alleging disparate treatment are untimely and barred by Title VII's statute of limitations.

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[2] The prescribed 180 day period "is not a jurisdictional bar, but it is treated as a violation of a statute of limitations, complete with whatever defenses are available to such a violation, such as equitable tolling and estoppel." *Santa Maria*, 202 F.3d at 1176. Plaintiffs have not argued that any defense to the statute of limitation is applicable here. They have, however, asserted that charges of discrimination were filed "with the Federal and State EEOC agencies in Seattle, Washington, in and around October, 1997." (Pls.' Mem. at 4). But the evidence cited by Plaintiffs does not in fact support this assertion. (*See* Pls.' Statement of Disputed Facts ¶ 59 (citing Additional Aff. of Gregory C. Tollefson, Exs. 15, 88 & 173)). And there is nothing in the record that shows that charges were filed in October, 1997, or ever filed with any state or local agency.

A review of Leal's evidence offered in support of her hostile environment claim results in a similar conclusion. The majority of Leal's allegations with regard to this claim focus on the conduct of Moore. However, Moore's employment terminated as of April 18, 1997, and therefore by June 19, 1997 he could no longer be the source of any harassment complaint. The incidents that Leal attributes to Wetten all occurred prior to June 19, 1997. (*See, e.g.*, Pls.' Statement of Disputed Facts ¶ 29). Therefore, the charge alleging a hostile work environment also is time-barred.

The event giving rise to Leal's last claim, constructive discharge, is deemed to have occurred on the date she resigned. *See Draper*, 147 F.3d at 1110 ("We hold . . . that the date of discharge triggers the limitations period in a constructive discharge case . . . ."). Because that date, October 1, 1997, is within the 180 day limitations period, the charge was timely filed with the EEOC, and the Court may consider it. To survive summary judgment on this claim, however, Leal must show that there are triable issues of fact as to whether on October 1, 1997 "a reasonable person in her position would have felt that she was forced to quit because of intolerable and discriminatory working conditions." *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995). Given that the constructive discharge claim is related to the disparate treatment and hostile environment claims, *see Draper*, 147 F.3d at 1110 & n.2, it is not surprising that Leal is unable to come forward with any competent evidence to show that she was subject to intolerable working conditions on October 1, 1997.

As discussed above, Edward Moore, the person Leal alleges was primarily responsible for creating the hostile work environment, had left TCI by April 18, 1997. And there are no acts by Wetten after June 19, 1997 that Leal relies on to support her constructive discharge claim. Instead, Leal

makes the general assertion that "I left TCI because I finally could no longer function in a productive manner in a work environment that was so hostile and unfair to the women sales account executives." (Aff. of Cathy Leal ¶ 4). Without citation to specific incidents, Leal cannot defeat summary judgment based on this conclusory assessment. *Cf. Draper*, 147 F.3d at 1110. Because the record is devoid of evidence to show the existence on October 1, 1997 of "intolerable and discriminatory working conditions," TCI is entitled to summary judgment on Leal's constructive discharge claim. *Montero v. AGCO Corp.*, 192 F.3d 856, 860 (9th Cir. 1999) (holding that plaintiff failed to present triable issue of fact on constructive discharge claim where plaintiff resigned 3 to 4 months after harassment had ceased); *Steiner*, 25 F.3d at 1465 (affirming the district court's dismissal of an employee's constructive discharge claim, when the employee resigned two and one-half months after the harassment had ceased); *see also Huskey v. City of San Jose*, 204 F.3d 893, 900-02 (9th Cir. 2000).

In sum, with the exception of Leal's constructive discharge claim, all the Plaintiffs' Title VII claims are time-barred and TCI is entitled to summary judgment on these claims. Because Leal fails to present a triable issue of fact on her constructive discharge claim, TCI is entitled to summary judgment on this claim as well.

2. Cole's ADEA Claim

Cole's ADEA claim is subject to the same 180 day requirement as her Title VII claims. *See Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 674-75 (9th Cir.1988). For the reasons discussed above, Cole's ADEA claim is time-barred and the Court will enter summary judgment on this claim in favor of TCI.

3. EPA Claims

Plaintiffs claim that TCI violated the Equal Pay Act by 1) "denying plaintiff[s] . . . accounts earned, and giving the same to male account executives," and 2) "providing similarly situated male account executives with bonuses, benefits and other 'perks' not offered or provided to plaintiff[s]."[3] "To establish a prima facie case of wage discrimination, a plaintiff must show that the employer pays different wages to employees of the opposite sex for substantially equal work." *Maxwell v. Tucson*, 803 F.2d 444, 446 (9th Cir. 1986). The EPA defines what constitutes equal work by specifying that jobs are equal if their performance requires "equal skill, effort, and responsibility" and they are performed under "similar working conditions." 29 U.S.C. S 206(d)(1). "Skill includes such considerations as experience, training, education, and ability. Effort refers to the physical or mental exertion necessary to the performance of a job. Responsibility concerns the degree of accountability required in performing a job." *McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 513 (8th Cir. 1995).

Plaintiffs have provided only conclusory deposition testimony that the male account executives to whom they compare themselves earned "different wages" for "equal work." It is undisputed that all account executives earned the same base wage. (Pls.' Statement of Disputed Facts ¶ 31). Plaintiffs also acknowledge that while senior account executives earned a higher base wage and garnered a large

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[3] Plaintiffs also claim that TCI violated the EPA by denying Plaintiffs promotions based on their sex. The EPA, however, does not provide a mechanism for challenging the right to a promotion; it is concerned solely with wage discrimination. *See, e.g., Maxwell v. Tucson*, 803 F.2d 444, 445-46 (9th Cir. 1986) ("The principle of the Equal Pay Act, 29 U.S.C. § 206(d), is that employees doing equal work should be paid equal wages, regardless of sex.").

share of the "perks," they generally had more experience, responsibilities and education than account executives. (Pls.' Statement of Disputed Facts ¶¶ 54, 8, & 9). What Plaintiffs do challenge is the manner by which Wetten assigned accounts and the corresponding commission earned on those accounts by the male account executives. (Pls.' Statement of Disputed Facts ¶ 55). But Plaintiffs fail to support their challenge with any evidence to establish the amounts earned by male account executives in relation to the amounts earned by Plaintiffs. (*See id.*). They also fail to identify which male account executives performed their jobs at the same level of skill, effort and responsibility as Plaintiffs. (*See id.*). By neglecting to do so, the Plaintiffs have failed as a matter of law to make out a prima facie case and summary judgment must be entered in favor of TCI. *See Euerle-Wehle v. United Parcel Service, Inc.*, 181 F.3d 898, 901 (8th Cir. 1999) (upholding entry of summary judgment on EPA claim where plaintiff failed as a matter of law to make out a prima facie case).

4. State Law Claims

Before addressing TCI's motion for summary judgment on Plaintiffs' state law claims, it is prudent to consider whether the Court should continue to exercise jurisdiction over these claims. *Acri v. Varian Associates*, 114 F.3d 999, 1001 (9th Cir. 1997) (en banc). Where, as here, the Court has determined prior to trial that all federal claims shall be dismissed, "the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." *Id.* (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n. 7 (1988)). Thus, in accordance with the direction provided by the case law, and consistent with the factors set forth in 28 U.S.C. § 1367(c), the Court declines to exercise its discretion to hear the state law claims and will dismiss the claims without prejudice to the Plaintiffs' right to refiled them in state court.

ORDER

Based on the foregoing, the Court being fully advised in the premises it is HEREBY ORDERED that:

1. The Defendants' Motion for Summary Judgment (Docket No. 43) is GRANTED as to the Plaintiffs' federal law claims, including the First, Fourth, Fifth, Tenth, Thirteenth, Twentieth, and Twenty-Third claims for relief of the First Amended Complaint.

2. The Plaintiffs' remaining state law claims are DISMISSED without prejudice to the Plaintiffs' right to refile them in state court.

3. The Defendants' Motion to Compel Discovery (Docket No. 71) is DISMISSED as moot.

4. The Defendants' Motions in Limine (Docket Nos. 76, 77, 78, 79, 80, 81, 82, 83 & 84) and Motion for Leave to File Additional Motions in Limine (Docket No. 86) are DISMISSED as moot.

5. The Plaintiffs' Motions in Limine (Docket Nos. 87, 88, 89, & 90) are DISMISSED as moot.

IT IS FURTHER ORDERED that the trial scheduled for June 13, 2000, is VACATED, and that this case is DISMISSED in its entirety.

Dated this 18th day of May, 2000

/s/ Edward J. Lodge
EDWARD J. LODGE
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

[Filed July 20, 2000]

Case No. CV98-342-S-EJL

PATRICIA A. COLE, CATHY LEAL, and BECKI TRUEBLOOD,
Plaintiffs,

vs.

TCI MEDIA SERVICES, GREAT NORTHWEST REGION, an entity of unknown type; TCI MEDIA SERVICE, Boise, an entity of unknown type; UNITED CABLE TELEVISION CORP., a Delaware Corporation; TCI COMMUNICATIONS, INC., a Delaware corporation; TELECOMMUNICATIONS, INC., a Delaware corporation; BRUCE WETTEN, an individual; and EDWARD MOORE, an individual,

Defendants.

ORDER

Plaintiffs Patricia A. Cole, Cathy Leal and Becki Trueblood have filed a Motion for Reconsideration or, In the Alternative, Motion For a New Trial, wherein they request that the Court reconsider its decision of May 18, 2000 to grant summary judgment on Plaintiffs' federal claims in favor of Defendants TCI Media Services, *et al.* TCI opposes the Plaintiffs' motion. Having fully reviewed the record, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, this motion shall be decided on the record before this Court without a hearing.

Plaintiffs' motion is brought pursuant to Federal Rules of Civil Procedure 59(e) and 60(b). "[A] motion for reconsideration of summary judgment is appropriately brought under either Rule 59(e) or Rule 60(b)." *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1442 (9th Cir. 1991). While both of these rules may be used to correct a judgment or order, they are distinctly and significantly different in their applicability and scope. Rule 59(e) explicitly permits a court to entertain a motion to alter or amend a judgment, and such a motion may be granted where the movant raises newly discovered evidence or points out an intervening change in controlling law or demonstrates manifest errors of law or fact. *School Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994). Rule 60(b) relief, on the other hand, is reserved for the exceptional case and may only be granted only upon a showing of (1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) "extraordinary circumstances" which would justify relief. Fed. R. Civ. P. 60(b); *Fuller*, 950 F.2d at 1442.

In this case, the Court's ruling on TCI's Motion for Summary Judgment was based on the absence of any evidence in the record sufficient to raise a genuine issue of material fact as to whether the Plaintiffs had complied with Title VII and the ADEA's statute of limitations. As the Court explained in its Order, to be considered timely under Title VII and the ADEA "a complainant [must] file a charge with the EEOC within 180 days of the last act of alleged discrimination, unless the complainant initially institutes proceedings with a state or local agency, in which case the EEOC charge must be filed within 300 days." (Order of May 18, 2000 at 3 (quoting *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1176 (9th Cir. 2000)). To qualify for the 300-day, as opposed to the 180-day, time limitation, a complainant must file her charge with the state or local agency that has the "authority to grant or seek relief from such [unlawful

employment] practice." 42 U.S.C. § 2000e-5(e)(1). Because no party disputed the fact that all the alleged events supporting Plaintiffs' claims occurred in Idaho, (*see* Pls.' Statement of Disputed Facts ¶ 1), the Court looked for any documentation that demonstrated a charge had been filed with the Idaho Human Rights Commission ("IHRC"). With the record devoid of any such evidence, the Court applied the 180-day statute of limitations to Plaintiffs' claims. The only documentation in the record that provided evidence of a "filing" showed that the Plaintiffs' charges were received by the EEOC on December 16, 1997. The Court then concluded that the last act of alleged discrimination occurred 180 days prior to the filing of the Plaintiffs' charges with the EEOC.[1]

The Plaintiffs have now come forward with new evidence that they claim demonstrates the timely filing of their discrimination charges.[2] (*see* Pls.' Mem. in Supp. of Their Mot. at 4-17). Before considering this new evidence, however, both Rule 59(e) and Rule 60(b) indicate that the Court should determine whether the new evidence is "newly discovered evidence." *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211 (9th Cir. 1987). In this regard, Plaintiffs must show that the evidence could not have been discovered at the time of summary judgment. *Id.* Plaintiffs fail to make this showing. In fact the Plaintiffs

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[1] Plaintiff Leal's constructive discharge claim was an exception. Entry of summary judgment in favor of TCI on this claim was based on the merits.

[2] As noted in the Order of May 18, 2000, the prescribed 180-day period "is not a jurisdictional bar, but it is treated as a violation of a statute of limitations, complete with whatever defenses are available to such a violation, such as equitable tolling and estoppel." *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1176 (9th Cir. 2000). Plaintiffs have not, and do not argue in the Motion for Reconsideration or, In the Alternative, Motion For a New Trial, that any defense to the statute of limitation is applicable here. They argue instead that the new evidence shows they have in fact complied with the statute of limitations.

candidly admit that the new evidence was obtained by merely requesting the documentation from the relevant federal and state agencies. (Pls.' Mem. in Supp. of Their Mot. at 6). "Evidence is not 'newly discovered' under the Federal Rules if . . . could have been discovered with reasonable diligence." *Coastal Transfer Co.*, 833 F.2d at 211. For this reason, the Court will not consider the proffered evidence as "newly discovered evidence" under Rules 59(e) and 60(b).

Nor can the Plaintiffs rely on the "excusable neglect" provision of Rule 60(b). The Plaintiffs state that "by mistake or inadvertence, or [by] overlooking the contents of the record" the new evidence was not originally submitted at summary judgment. (Pls.' Mem. in Supp. of Their Mot. at 14, 15). However, the Ninth Circuit Court of Appeals has specifically ruled that "[n]either ignorance nor carelessness on the part of the litigant or his attorney provide grounds for relief under Rule 60(b)(1)." *Engleson v. Burlington Northern R. Co.*, 972 F.2d 1038, 1043 (9th Cir. 1992) (*citing Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir. 1990) (if failure to submit evidentiary materials is solely due to attorney's carelessness, then it would be an abuse of discretion for the court to grant Rule 60(b) relief)). Similarly, the Plaintiffs have not demonstrated the existence of "extraordinary circumstances" which would justify relief under Rule 60(b). *See id.* at 1044. The Court concludes, then, that consideration of the Plaintiffs' new evidence is not appropriate under either Rule 59(e) or Rule 60(b).

Moreover, even if the new evidence was considered as part of the record at summary judgment, at least as to the analysis of Trueblood and Leal's claims, it would not alter the Court's ruling. With regard to these Plaintiffs the new evidence would show that the discrimination charges had been filed with the Seattle Office of Civil Rights as well as with the EEOC. Under 42 U.S.C. § 2000e-5(e)(1), the statute of limitations is expanded to 300 days where a charge of

discrimination is filed with the state or local agency that has the "authority to grant or seek relief from such [unlawful employment] practice." Plaintiffs contend that since venue for their lawsuit was arguably proper in Washington then the filing of a discrimination charge with the Seattle Office of Civil Rights satisfied the requirement of 42 U.S.C. § 2000e-5(e)(1). However, there is no correlation between venue and the requirement of § 2000e-5(e)(1), and the Plaintiffs offer no authority to support this novel proposition. Thus, even assuming venue would have been proper in Washington, there is nothing in the record to show that the Seattle Office of Civil Rights had the "authority to grant or seek relief from [the alleged unlawful employment] practice." In fact it did not, because all events giving rise to the Plaintiffs' claims occurred in Idaho.[3] (*See* Pls.' Statement of Disputed Facts ¶ 1).

With regard to Cole's claims, the Plaintiffs argue that TCI in its opening brief failed to adequately articulate a statute of limitations challenge to Cole's EEOC filing. (Pls.' Mem. in Supp. of Their Mot. at 12). But as Plaintiffs acknowledge in their motion, "Plaintiffs, in Undisputed Fact No. 59, alleged compliance with the administrative filing requirements, citing to defendants' Exhibits in support of the Motion for Summary Judgment." (Pls.' Mem. in Supp. of Their Mot. at 5). In reply to Plaintiffs' Undisputed Fact No. 59, TCI argued noncompliance with the statute of limitations as to all three Plaintiffs. With the matter in issue, the Court reviewed the evidence cited in Plaintiffs' Undisputed Fact No. 59 and

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[3] In their Reply, the Plaintiffs also argue that certain TCI actors located in Washington "condoned the discriminatory conduct" of the TCI defendants located in Idaho, and therefore would be subject to the enforcement authority of the Seattle Office of Civil Rights. This theory, however, is directly contrary to the Plaintiffs' theory of the case at summary judgment. (*See* Pls.' Statement of Disputed Facts ¶ 1). Accordingly, the Court will not consider it.

concluded that it did not support the Plaintiffs' assertion that Cole, Leal and Trueblood had all filed charges with the EEOC and/or the Idaho Human Rights Commission, "in and around October, 1997." (Order of May 18, 2000 at 4 & n.2). In fact, as the Court noted, there was no evidence of any kind to suggest that charges had ever been filed with the Idaho Human Rights Commission. (*Id.*).

Prior to the Court's ruling, the Plaintiffs could have moved pursuant to Federal Rule of Civil Procedure 56(f) for additional time to discover documents in support of Undisputed Fact No. 59 and in opposition to the Motion for Summary Judgment. *Garrett v. City and County of San Francisco*, 818 F.2d 1515, 1518 (9th Cir.1987) (explaining that under Rule 56(f) "[t]he court may continue a motion for summary judgment if the opposing party needs to discover essential facts"); *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 519-20 (9th Cir. 1990) (explaining that only time constraint on filing a Rule 56(f) motion is contained in Rule 56(c)). That Plaintiffs did not do so in support of Leal and Trueblood's claims undermines the contention that Plaintiffs would have supplemented the record on behalf of Cole's claims if only TCI had made it clear in its opening brief "that [it was] attacking Cole's administrative filings." (Pls.' Mem. in Supp. of Their Mot. at 12). The Court, therefore, finds no reason to exercise its discretion and reconsider its ruling of May 18, 2000.

ORDER

Based on the foregoing, and the Court being fully advised in the premises, it is HEREBY ORDERED that the Plaintiffs' Motion for Reconsideration or, In the Alternative, Motion For a New Trial (Docket No. 95) is DENIED.

Dated this 18th day of July, 2000

/s/ Edward J. Lodge
EDWARD J. LODGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. 98-CV-342

PATRICIA A. COLE, CATHY LEAL, and BECKI TRUEBLOOD,
Plaintiffs,

vs.

TCI MEDIA SERVICES, GREAT NORTHWEST REGION, an entity of unknown type; TCI MEDIA SERVICE, Boise, an entity of unknown type; UNITED CABLE TELEVISION CORP., a Delaware Corporation; TCI COMMUNICATIONS, INC., a Delaware corporation; TELECOMMUNICATIONS, INC., a Delaware corporation; BRUCE WETTEN, an individual; and EDWARD MOORE, an individual,

Defendants.

PLAINTIFF'S STATEMENT OF DISPUTED FACTS AND ADDITIONAL MATERIAL FACTS IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

DEFENDANT MATERIAL FACTS	PLAINTIFF'S DISPUTED FACTS AND ADDITIONAL FACTS IN DISPUTE
1. All Plaintiffs have conceded that their entire employment with TCI Media Services took place in Idaho, that they were hired and employed for the entire duration of their employment in the Boise, Idaho office, that they were never employed in Washington or any other state. (Ex. 26 at Responses 2-4) Consequently; all of the alleged claims in the Complaint and in Plaintiffs' EEOC charges were based entirely on acts that took place in Idaho if they occurred anywhere.	1. Plaintiffs do not dispute this fact.
2. Defendant Wetten has at all relevant times been employed by United Cable Television Corp.,d.b.a TCI Media Services ("UCTC") as General Manager in its Boise, Idaho office with full supervisory authority over Plaintiffs. (Wetten, ¶2.)	2. Plaintiffs do not dispute this fact.
3. Defendant Edward Moore was employed by UCTC from May 6, 1993 until April 18, 1997. (Ex. 94, 113.) He was initially employed as an Account Ex-	3. Plaintiffs do not dispute this fact.

ecutive until July of 1996, and he was then employed as a Senior Account Executive until September 16, 1996. (Wetten,. 395:22-396:2; Ex.99.) He was employed as a Team Leader from September 16, 1996 until he tendered his resignation on or about March 31, 1997. (Moore, 274:19-275:3.)	
4. Moore was never the supervisor of Plaintiffs. (Trueblood, 139:3-8.) He was not in charge of or directed to, directly supervise the Plaintiffs. Specifically, during the period of July, 1996 to April 1997 when he was a Senior Account Executive and when he was	4. Disputed. The position of Team Leader was designated as a management position, which included supervisory management duties. (Taylor at 65:10-68:11; 70:4-19.) Lead described Ed Moore's position as management position. team leader as a (Leal at

Rcvd 12/16/97

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY: ☐ FEPA ☒ EEOC

CHARGE NUMBER: 380980278

Seattle Office for Civil Rights and EEOC
State or local Agency, if any

NAME (Indicate Mr., Ms., Mrs.): Ms. Cathy Leal

HOME TELEPHONE (Include Area Code):

STREET ADDRESS CITY, STATE AND ZIP CODE: C/O Kenneth D. Simoncini, Atty, 1694 The Alameda, San Jose, CA

DATE OF BIRTH: 11/12/60

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME: T C I Media Services

NUMBER OF EMPLOYEES, MEMBERS: Cat D (501 +)

TELEPHONE (Include Area Code):

STREET ADDRESS CITY, STATE AND ZIP CODE: 18 West Mercer, Suite 100, Seattle, WA 98119

COUNTY: 033

NAME: T C I Media Services Boise

TELEPHONE NUMBER (Include Area Code):

STREET ADDRESS CITY, STATE AND ZIP CODE: 5475 Gage St., Boise, Id 83706

COUNTY:

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es))

☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGIN
☐ RETALIATION ☐ AGE ☐ DISABILITY ☒ OTHER (Specify) Equal Pay

DATE DISCRIMINATION TOOK PLACE
EARLIEST LATEST
10/01/97
☐ CONTINUING ACTION

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s)):

I was hired by this company on 8-3-93. On a continuous basis from that date until I was forced to constructively discharge my employment, I was subjected to a hostile, intimidating, and unwelcome atmosphere of sexual harassment, adverse terms and conditions of employment, denied promotions and denied equal wages and benefits compared to male counterparts.

I believe that I have been discriminated against in violation of Title VII of the Civil Rights Act of 1964, as amended, and the Equal Pay Act.

RECEIVED
SEATTLE-EEOC
1997 DEC 16 A 9:52

EA 001457

☐ I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

12-11-8-97 X Cathy Leal

NOTARY - (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year)

BEST AVAILABLE COPY

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement Before completing this form.

AGENCY: ☐ FEPA ☒ EEOC

CHARGE NUMBER: 38D980279

Seattle Office for Civil Rights and EEOC
State or local Agency, if any

NAME (Indicate Mr., Ms., Mrs.): Ms. Becki Trueblood

HOME TELEPHONE (Include Area Code):

STREET ADDRESS, CITY, STATE AND ZIP CODE: C/O Kenneth D. Simoncini, Atty. 1694 The Alameda, San Jose, CA

DATE OF BIRTH: 04/26/63

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME: T C I Media Services, Great N W Reg

NUMBER OF EMPLOYEES, MEMBERS: Cat D (501 +)

TELEPHONE (Include Area Code):

STREET ADDRESS, CITY, STATE AND ZIP CODE: 18 West Mercer, Suite 100, Seattle, WA 98119

COUNTY: 033

NAME: T C I Media Services Boise

TELEPHONE NUMBER (Include Area Code):

STREET ADDRESS, CITY, STATE AND ZIP CODE: 5475 Gage St., Boise, I D 83706

COUNTY:

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es))

☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGIN
☐ RETALIATION ☐ AGE ☐ DISABILITY ☒ OTHER (Specify) Equal Pay

DATE DISCRIMINATION TOOK PLACE
EARLIEST: LATEST: 06/03/97
☐ CONTINUING ACTION

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s)):

I was hired by this company on 7 12 74. On a continuous basis from that date until I was forced to constructively discharge my employment, I was subjected to a hostile, intimidating, and unwelcome atmosphere of sexual harassment, adverse terms and conditions of employment, denied promotions and equal wages and benefits compared to male counterparts.

I believe that I have been discriminated against in violation of Title VII of the Civil Rights Act of 1964, as amended, and the Equal Pay Act.

RECEIVED
EEOC-EEOC
DEC 16 A 9:52

ER 001616

EXHIBIT
173
TRUEBLOOD 1-12-00

☐ I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

X 11/6/97 X Becki Trueblood
Date — Charging Party (Signature)

NOTARY - (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Day, month, and year)

T 0123

CHAR OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY: ☐ FEPA ☒ EEOC

CHARGE NUMBER: 380980334

Seattle Office for Civil Rights and EEOC
State or local Agency, if any

NAME (Indicate Mr., Ms., Mrs.): Ms. Patricia A. Cole

HOME TELEPHONE (Include Area Code): (208) 362-5555

STREET ADDRESS: 4878 Chinook Avenue

CITY, STATE AND ZIP CODE: Boise, ID 83709

DATE OF BIRTH: 01/23/54

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME: T.C.I. Media Services

NUMBER OF EMPLOYEES, MEMBERS: Cat C (201-500)

TELEPHONE (Include Area Code): (206) 526-8400

STREET ADDRESS: 18 W Mercer, Suite 100

CITY, STATE AND ZIP CODE: Seattle, WA 98119

COUNTY: 033

NAME: T.C.I. Media Services Boise

TELEPHONE NUMBER (Include Area Code):

STREET ADDRESS: 5475 Gage St.

CITY, STATE AND ZIP CODE: Boise, ID 83706

COUNTY:

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es))

☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGIN
☐ RETALIATION ☐ AGE ☐ DISABILITY ☒ OTHER (Specify) Equal Pay

DATE DISCRIMINATION TOOK PLACE
EARLIEST: 07/08/96
LATEST: 04/04/97
☐ CONTINUING ACTION

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s)):

I was employed by the above respondent as an Account Executive from July 8, 1996 until the date of my constructive discharge on April 4, 1997.

Throughout my tenure with this employer, I was subjected to a hostile work environment in which I was denied pay and benefits equitable with those accorded similarly situated male comparators; lucrative sales assignments were taken from me and given to male comparators; I was denied promotion; and I was sexually harassed, both physically and verbally. Repeated complaints to management failed to resolve the continuing harassment and discrimination, compelling my constructive discharge on April 4, 1997.

I charge that, in all of these particulars, Respondent discriminated against me because of my gender, female, and my age, then 43, in violation of Title VII of the Civil Rights Act of 1964, as amended; the Equal Pay Act of 1963; and the Age Discrimination in Employment Act of 1967.

(Motteen)

000541

0004451

☐ I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

X 1/16/98 X Patricia Cole
Date — Charging Party (Signature)

NOTARY - (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year)

EEOC FORM 5 (Rev. 06/94)

FILE COPY

EEOC Form 161-B (10/96) U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE (ISSUED ON REQUEST)

To: Cathy Leal
10655 Conway Ave.
Boise, ID 83709

From:
EEOC - Seattle District Office
909 First Avenue, Suite 400
Seattle, WA 98104-1061

[ ] *On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR § 1601.7(a))*

Charge No.	EEOC Representative	Telephone No.
380980278	F. Frances Palmer	(206) 220-6865

(See also the additional information attached to this form.)

NOTICE TO THE PERSON AGGRIEVED:

Title VII of the Civil Rights Act of 1964 and/or the Americans with Disabilities Act (ADA): This is your Notice of Right to Sue, issued under Title VII and/or the ADA based on the above-numbered charge. It has been issued at your request. Your lawsuit under Title VII or the ADA must be filed in federal or state court WITHIN 90 DAYS of your receipt of this Notice. Otherwise, your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

[ ] More than 180 days have passed since the filing of this charge.

[X] Less than 180 days have passed since the filing of this charge, but I have determined that it is unlikely that the EEOC will be able to complete its administrative processing within 180 days from the filing of the charge.

[X] The EEOC is terminating its processing of this charge.

[ ] The EEOC will continue to process this charge.

Age Discrimination in Employment Act (ADEA): You may sue under the ADEA at any time from 60 days after the charge was filed until 90 days after you receive notice that we have completed action on the charge. In this regard, the paragraph marked below applies to your case:

[ ] **The EEOC is closing your case. Therefore, your lawsuit under the ADEA must be filed in federal or state court WITHIN 90 DAYS of your receipt of this Notice. Otherwise, your right to sue based on the above-numbered charge will be lost.**

[ ] **The EEOC is continuing its handling of your ADEA case. However, if 60 days have passed since the filing of your charge, you may file suit in federal or state court under the ADEA at this time.**

Equal Pay Act (EPA): You already have the right to sue under the EPA (filing an EEOC charge is not required.) EPA suits must be brought in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.

If you file suit based on this charge, please send a copy of your court complaint to this office.

On behalf of the Commission

Jeanette M. Leino, District Director

FEB 10 1998
(Date Mailed)

Enclosure(s)

cc: TCI Media Svcs., attn: Personnel/HR (Seattle)
Kenneth D. Simoncini, Esq., Charging Party atty.
Personnel Administrator, TCI Boise.

ER 000285

0004457

EEOC Form 161-B (10/96)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE *(ISSUED ON REQUEST)*

EXHIBIT 174 TRUEBLOOD 1-12-00

To: Becki Trueblood
3777 Newtown Rd.
Placerville, CA 95667

From:
EEOC - Seattle District Office
909 First Avenue, Suite 400
Seattle, WA 98104-1061

[ ] *On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR § 1601.7(a))*

Charge No.	EEOC Representative	Telephone No.
380980279	F. Frances Palmer	(206) 220-6865

(See also the additional information attached to this form.)

NOTICE TO THE PERSON AGGRIEVED:

Title VII of the Civil Rights Act of 1964 and/or the Americans with Disabilities Act (ADA): This is your Notice of Right to Sue, issued under Title VII and/or the ADA based on the above-numbered charge. It has been issued at your request. Your lawsuit under Title VII or the ADA must be filed in federal or state court WITHIN 90 DAYS of your receipt of this Notice. Otherwise, your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

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[X] The EEOC is terminating its processing of this charge.

[ ] The EEOC will continue to process this charge.

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[ ] The EEOC is closing your case. Therefore, your lawsuit under the ADEA must be filed in federal or state court WITHIN 90 DAYS of your receipt of this Notice. Otherwise, your right to sue based on the above-numbered charge will be lost.

[ ] The EEOC is continuing its handling of your ADEA case. However, if 60 days have passed since the filing of your charge, you may file suit in federal or state court under the ADEA at this time.

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If you file suit based on this charge, please send a copy of your court complaint to this office.

On behalf of the Commission

Michael C. Fogt for
Jeanette M. Leino, District Director

FEB 10 1998
(Date Mailed)

Enclosure(s)

cc: TCI Media Svcs., attn: Personnel/HR
Kenneth D. Simoncini, Esq., Charging Party atty.
TCI Media Services BOISE (Personnel Admr)

T 000330

T 0126

31a
APPENDIX K

MAY-18-00 06:35 From:EEOC 909 1ST AVENUE #400 2062206911 T-423 P.04 Job-537

EEOC Form 161-B (10/96)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE (ISSUED ON REQUEST)

To:Patricia A. Cole
4878 Chinook Avenue
Boise, ID 83709

From:
EEOC - Seattle District Office
909 First Avenue, Suite 400
Seattle, WA 98104-1061

[ ] *On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (20 CFR § 1601.7(a))*

Charge No.	EEOC Representative	Telephone No.
380980334	Frances Palmer, Supervisory Investigator	(206) 220-6865

(See also the additional information attached to this form.)

NOTICE TO THE PERSON AGGRIEVED:

Title VII of the Civil Rights Act of 1964 and/or the Americans with Disabilities Act (ADA): This is your Notice of Right to Sue, issued under Title VII and/or the ADA based on the above-numbered charge. It has been issued at your request. Your lawsuit under Title VII or the ADA must be filed in federal or state court WITHIN 90 DAYS of your receipt of this Notice. Otherwise, your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

[ ] More than 180 days have passed since the filing of this charge.

[x] Less than 180 days have passed since the filing of this charge, but I have determined that it is unlikely that the EEOC will be able to complete its administrative processing within 180 days from the filing of the charge.

[x] The EEOC is terminating its processing of this charge.

[ ] The EEOC will continue to process this charge.

Age Discrimination in Employment Act (ADEA): You may sue under the ADEA at any time from 60 days after the charge was filed until 90 days after you receive notice that we have completed action on the charge. In this regard, the paragraph marked below applies to your case:

[ ] The EEOC is closing your case. Therefore, your lawsuit under the ADEA must be filed in federal or state court WITHIN 90 DAYS of your receipt of this Notice. Otherwise, your right to sue based on the above-numbered charge will be lost.

[ ] The EEOC is continuing its handling of your ADEA case. However, if 60 days have passed since the filing of your charge, you may file suit in federal or state court under the ADEA at this time.

Equal Pay Act (EPA): You already have the right to sue under the EPA (filing an EEOC charge is not required.) EPA suits must be brought in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.

If you file suit based on this charge, please send a copy of your court complaint to this office.

On behalf of the Commission

Jeanette M. Leino, District Director

FEB [redacted]

(Date Mailed)

Enclosure(s)

cc:
TCI Media Services Boise and Seattle

Kenneth D. Simoncini, Attorney for Cole

EK 001654

000013

APPENDIX M

SIMONCINI & ASSOCIATES
Attorneys at Law
169-4 The Alameda
San Jose, California
95126-2219

Kenneth D. Simoncini, P.C.

Telephone
(408) 280-7711

Melanie D. Roberts
Marilynn J. Winters
Kerri A. Ridley
Michael A. Penfield
Corinne D. Barton
Charles M. Pollock

Facsimile
(408) 280-1330

Pamela A. Bauer, Paralegal

FAX COVER SHEET

DATE: December 31, 1997 COPY TO BE MAILED

TOTAL PAGES: 5 YES: X NO: ___
(Including Cover Page)

TO: Mr. John Townsend FAX NO: (206) 220-6911

FROM: Kenneth D. Simoncini, P.C.

RE: Cole v. TCI Media Services

MESSAGE: Please see the accompanying letter dated December 31, 1997. Thank you.

IMPORTANT NOTICE

This transmission is intended only for the use of the individual or entity to which it is addressed, and may contain information that is privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED! If you have received this communication in error, please notify this office immediately by telephone and return the original message to the above address via the United States postal service. Thank you.

IF YOU DO NOT RECEIVE ALL PAGES, OR ARE DISCONNECTED, PLEASE CALL 408/280-7711 AS SOON AS POSSIBLE.

Telecopier Operator: Rachel

Simoncini & Associates
Attorneys at Law
169-4 The Alameda
San Jose, California
95126-2219

Kenneth D. Simoncini, P.C.

Telephone
(408) 280-7711

Melanie D. Roberts
Marilynn J. Winters
Kerri A. Ridley
Michael A. Penfield
Corinne D. Barton
Charles M. Pollock

Facsimile
(408) 280-1330

Pamela A. Bauer, Paralegal

December 31, 1997

John Townsend — via facsimile and U.S. mail
Equal Employment Opportunity Commission (206) 220-6911
Seattle District Office
909 First Avenue, Suite 400
Seattle, WA 98104

Re: EEOC Charge #380980253
Cole v. TCI Media Services

Dear Mr. Townsend:

We are in receipt of your correspondence of December 17, 1997, enclosing a proposed amended charge in the above matter.

We request that the charge be amended to reflect the facts and information contained within the enclosed Declaration of Patricia A. Cole in Support of Charge of Discrimination.

Once the charge has been amended to reflect the Declaration, this office intends to request a right to sue letter.

Of note, we request that the named employer be amended to name TCI Media Services, Great Northwest Region, a company that employs in excess of 500 employees. We also request that the charge also be filed with the Seattle Office for Civil Rights, and not the Idaho State Human Rights Commission. We also request the addition of a charge of discrimination based on age. Other amendments are contained within the Declaration.

* * * *

Simoncini & Associates

We would appreciate if this matter could be expedited, due to statutes of limitations considerations.

Please feel free to contact the undersigned if you have any questions.

Very truly yours,
/s/ Kenneth D. Simoncini
KENNETH D. SIMONCINI

KDS/CDB:
enclosure

DECLARATION OF PATRICIA A. COLE IN SUPPORT OF CHARGE OF DISCRIMINATION

I, PATRICIA COLE, declare as follows:

1. My name is Patricia A. Cole.

2. My address and telephone number are as follows: 4878 Chinook Avenue, Boise, ID 83709, (208) 362-5555.

3. I am a female.

4. My date of birth is: 1/23/54.

5. My Social Security Number is: 553-84-6334.

6. The company and individuals against whom this charge is made are: TCI Media Services, Great Northwest Region, located at 18 West Mercer, Suite 100, Seattle, Washington, 98119; Bruce Wetten, General Manager, at the TCI Media Services Boise office, located at 5475 Gage Street, Boise, Idaho, 83706; Edward Moore, former Team Leader at the TCI Media Services Boise office, current address unknown.

7. I am informed and believe that TCI Media Services employs in excess of 500 employees. TCI Media Services is a cable advertising business.

8. While employed at TCI Media Services, I held the position of Account Executive.

9. I was employed at TCI Media Services from July 8, 1996, to April 4, 1997.

10. I am making the following charges: I was harassed, subjected to a hostile work environment forced to quit, constructively terminated, and denied promotion, benefits and equal pay because of my gender/sex and age.

11. I request that the EEOC also file this charge with the Seattle Office for Civil Rights.

12. I base these charges on the fact that during my employment with TCI Media Services, I experienced a hostile work environment, and harassing and abusive conduct, including but not limited to: Moore would touch me in an inappropriate manner, rubbing my shoulders and chest; Moore would grab me from behind, physically restrain me, and mock intercourse; Wetten and Moore referred to the female sales people in the office as "My bitches" or "bitches"; Wetten responded to my complaints about

* * * *

Moore by saying that Moore was "harmless"; Moore would derogatorily comment on my age; I did not receive compensation comparable to similarly situated males; I was denied a rightful promotion to senior account executive; Lucrative sales accounts that rightfully belonged to me would be given to male account executives; regional management, including Penny Taylor and Karin Brasch, sanctioned such behavior and attitudes.

13. The last date of the above discrimination was April 4, 1997.

I declare under penalty of perjury under the laws of the State of Idaho that the foregoing is true and correct.

Executed on December 31, 1997, at Boise, Idaho.

/S/ Patricia A. Cole
PATRICIA A. COLE

APPENDIX N

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Seattle District Office

Federal Office Building
909 First Avenue, Suite 400
Seattle, WA 98104
PH: (206) 220-6883
TDD: (206) 220-6882
FAX: (206) 220-6911

January 6, 1998

KENNETH D. SIMONCINI
Attorney at Law
1694 The Alameda
San José, California 95126-2219

Re: EEOC Charge #380980334
Cole -v- TCI Media Services

Dear Mr. Simoncini:

Pursuant to your fax transmission of December 31, 1997 in re the above matter, please find enclosed charge documents of a separate (as distinct from an amended) charge against TRI [*sic*]Media Services.

The new charge, briefly incorporating the allegations brought forth in your client's Declaration as received in the above-referenced fax transmission, was docketed, assigned the above number, and served on the respondent this date. In order to facilitate further processing of this charge, please have your client sign the enclosed charge forms and return them to this office in care of my attention, as soon as practicable.

When the signed charge forms are received in this office, the charge will be co-filed, per your request, with the Seattle Human Rights Commission, and processing of your Notice of Right to Sue request will commence.

Please refer to the above charge number in all future correspondence with this office, and take note that this number is separate and distinct from Charge #380980253, Cole -v- TCI Telecommunications. That number should be referenced in communications dealing exclusively with TCI Telecommunications, and both numbers should be used when referring to matters involving both respondent entities.

Paul [*sic*] D. Simoncini

January 6, 1998
Page 2 of 2

If you have any questions, please call me at 1-800-669-4000. I am usually in the office from 8:00-4:30 Tuesdays through Fridays. In the event that these charge forms are not returned, or I have not otherwise heard from you or your client within 30 days from the date of this letter, I will presume that you do not wish to pursue the matter further, and the case file will be destroyed without further action.

Cordially,

John Townsend
Seattle District Office
Charge Receipt/Technical Information Unit

APPENDIX O

SIMONCINI & ASSOCIATES
Attorneys at Law
1694 The Alameda
San Jose, California
95126-2219

RECEIVED

-9 A 9:08

Kenneth D. Simoncini, P.C.

Melanie D. Roberts
Marilynn J. Winters
Kerri A. Ridley
Corinne D. Barton
Charles M. Pollock

Pamela A. Bauer, Paralegal

Telephone
(408) 280-7711

Facsimile
(408) 280-1330

E-mail
kds@simoncini-law.com

February 6, 1998

VIA FACSIMILE AND U.S. MAIL
FAX: (206) 220-6911

F. Frances Palmer
U.S. Equal Employment Opportunity Commission
Seattle District Office
909 First Avenue, Suite 400
Seattle, WA 98104

Re: Cole v. TCI Media Services, EEOC Charge Numbers 380980253, 380980334;
Leal v. TCI Media Services, EEOC Charge Number 380980278;
Trueblood v. TCI Media Services, EEOC Charge Number 380980279

Dear Ms. Palmer:

On behalf of our clients, Patricia A. Cole, Cathy Leal, and Becki Trueblood, we request that the Equal Employment Opportunity Commission issue the rights to sue in the above-referenced matters.

Thank you for your courtesy and cooperation in this matter.

Very truly yours,

/s/ Kenneth D. Simoncini
Kenneth D. Simoncini

KDS/CDB:

APPENDIX P

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
SEATTLE DISTRICT OFFICE

[SEAL]

909 First Avenue, Suite 400
Seattle, WA 98104-1061
PH: (206) 220-6880
TDD: (206) 220-6882
FAX: (206) 220-6911

"ARE YOU IN THE RIGHT PLACE?"
Jurisdictional information for Charging Parties

This information is being given to you to help you decide whether or not your employment problem can be handled by the United States Equal Employment Opportunity Commission (EEOC). If you have difficulty understanding these instructions or need special assistance, ask to speak to one of the Intake Officers.

The EEOC enforces the following laws prohibiting employment discrimination:

Title VII of the Civil Rights Act of 1964, as amended (TITLE VII)

The Age Discrimination in Employment Act of 1967, as amended (ADEA)

Title I of The Americans with Disabilities Act of 1990, as amended (ADA)

The Equal Pay Act of 1963 (EPA)

Sections 501 and 505, of the Rehabilitation Act of 1973, as amended

EEOC receives and investigates employment discrimination charges against private employers (with 15 or more employees under Title VII and ADA, 20 or more employees under the ADEA) state and local governments, educational institutions, employment agencies, and labor organizations (with 25 or more members under the ADEA). If the employment discrimination involves a federal government agency, STOP and ask to speak to an Intake Officer.

Generally, a charge must be filed within *300 days* of the date of the date when the alleged act of discrimination occurred.

Sometimes employment practices are unfair, but not illegal. We can only take charges of *illegal* discrimination. This means that unfair treatment you claim to have received must have happened because of one or more of the reasons below:

Your RACE

Your RELIGIOUS BELIEFS

Your NATIONAL ORIGIN

Your COLOR

Your AGE (if you are age 40 or over)

Your DISABILITY

Your SEX

Your PREGNANCY

RETALIATION for the following:

Because you opposed an act violating one of the laws enforced by the EEOC;

Because you participated in any way in an investigation or proceeding conducted by the EEOC; or

Because you associated with someone protected by one of the laws enforced by the EEOC.

UNFAIR TREATMENT THAT IS *NOT* DUE TO ONE, OR MORE OF THE ABOVE REASONS IS *NOT* HANDLED BY THE EEOC.

If you believe that the action taken against you was based on one or more of the above reasons, please be prepared to explain to the Intake Officer how you were discriminated against and who was treated differently than you.

NOTE: All charges received by the EEOC are automatically co-filed with one of the local Fair Employment Practice Agencies listed below. Our work-sharing agreement provides for charges to be investigated by one of the agencies, not both. If you have already filed a charge it may not be necessary for you to also file with the EEOC. STOP and ask to speak to an Intake Officer.

Alaska State Commission for Human Rights
Idaho State Human Rights Commission
Anchorage Equal Rights Commission
Seattle Office for Civil Rights
Oregon Bureau of Labor & Industries,
Civil Rights Division
Tacoma Human Rights Department
Washington State Human Rights Commission

ER001609

EEOC/SEDO/CRTTU/Imf/Jurisdiction
April 1997

Supreme Court, U.S.
FILED
OCT 4 2002
OFFICE OF THE CLERK

No. 02-333

In the

Supreme Court of the United States

TCI MEDIA SERVICES, GREAT NORTHWEST REGION, an entity of unknown type; TCI MEDIA SERVICES, BOISE, an entity of unknown type; UNITED CABLE TELEVISION CORP., a Delaware corporation; TCI COMMUNICATIONS, INC., a Delaware corporation; TELE-COMMUNICATIONS, INC., a Delaware corporation; BRUCE WETTEN, an individual; and EDWARD MOORE, an individual,

Petitioners,

v.

PATRICIA A. COLE, CATHY LEAL, and BECKI TRUEBLOOD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Bradley G. Andrews Jones
Gledhill, Hess, Andrews,
Fuhrman, Bradbury &
Eiden, P.A.
The 9th & Idaho Center,
Suite 280
225 North 9th Street
P.O. Box 1097
Boise, Idaho 83701
(208) 331-1170

Kenneth D. Simoncini
*Marilynn J. Winters
Simoncini & Associates
1694 The Alameda
San Jose, California 95126
(408) 280-7771

*Counsel of Record

QUESTIONS PRESENTED BY PETITIONERS

With respect to Title VII of the Civil Rights Act of 1964:

1. Did the Ninth Circuit correctly hold that plaintiffs who worked in a deferral state (Idaho), and who knowingly instructed the Equal Employment Opportunity Commission to submit their sex discrimination charges in another state to a local agency which lacked authority to grant or seek the relief sought (City of Seattle Office of Civil Rights), had "filed" their charges with the EEOC within the meaning of 42 U.S.C. Section 2000e-5(c)?

With respect to parallel provisions of the Age Discrimination in Employment Act:

2. Did the Ninth Circuit correctly hold that a plaintiff who worked in a deferral state, and who knowingly instructed the Equal Employment Opportunity Commission to submit her age discrimination charges in another state to a local agency which lacked authority to grant or seek the relief sought, had exhausted her administrative remedies under 29 U.S. C. Section 633(b)?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

CORPORATE DISCLOSURE STATEMENT

In addition to the information provided by Petitioner, Respondents understanding of both TCI Media Services, Great Northwest Region and TCI Media Services, Boise, is that they were dba's of United Cable Television Corporation. Service of process for TCI Media Services, Boise, was served on Bruce Wetten, who was authorized to accept service. Service for TCI Media Services, Great Northwest Region was served, by consent, on defense counsel, with a waiver of service.

Defendant Tele-Communications, Inc., also known as "TCI," incorporated in Delaware, merged into another corporation named AT&T Broadband, LLC, on April 18, 2000, per a check of Corporations on Westlaw.

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In The
SUPREME COURT OF THE UNITED STATES

No.

TCI MEDIA SERVICES, GREAT NORTHWEST REGION, an entity of unknown type; TCI MEDIA SERVICES, BOISE, an entity of unknown type; UNITED CABLE TELEVISION CORP., a Delaware corporation; TCI COMMUNICATIONS, INC., a Delaware corporation; TELE-COMMUNICATIONS, INC., a Delaware corporation; BRUCE WETTEN, an individual; and EDWARD MOORE, an individual,
Petitioners,

v.

PATRICIA A. COLE, CATHY LEAL, and BECKI TRUEBLOOD,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents herein respectfully oppose the Petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit, which reversed, in part, the entry of summary judgment in Petitioners' favor by the United States District Court for the District of Idaho.

STATEMENT OF THE CASE

A. Facts Material To The Questions Presented.

1. While Respondents Were Employed in Idaho and Resigned There, The Discriminatory Acts Charged Were Perpetrated and Ratified by Petitioners and Their Agent Managers in Both Idaho and Seattle, Washington.

Respondents Patricia A. Cole, Cathy Leal and Becki Trueblood, worked for TCI Media Services in Boise, Idaho, as account executives selling commercial time to local businesses for TCI Cable. Petitioner Edward Moore was also an account executive, and Petitioner Bruce Wetten, was Respondents' and Moore's direct supervisor. (Petitioner's App. at 8a) Bruce Wetten's immediate supervisor, Penny Taylor, a Regional Vice President, worked at the TCI Media Services, Great Northwest Region office located in Seattle, Washington. (Respondents' App. at 2a, 4a, 11a and 13a.)

During the course of respondents' employment with TCI Media Services, each were pervasively harassed on the basis of gender (and additionally, age, as to Cole), and subjected to a hostile work environment by Wetten and Moore. (Respondents' App. at 1a - 4a, 6a, 10a, 11a.) The abusive and harassing sexual conduct of Moore were reported to Wetten, and reports of the discriminatory and sexually harassing/demeaning behavior of both Wetten and Moore were made to Kerin Brasch,

Regional Sales Manager and Regional Vice President, Penny Taylor (Wetten's supervisor), based at the TCI Western Regional office in Seattle. (Respondents' App. at 13a.) Wetten did not inform Taylor of the improper misconduct of Moore, as was required by TCI's Policy. When Petitioner Leal reported the improper and discriminatory conduct of Moore and Wetton to Taylor and to Brasch, who reported it to Taylor, no action was taken in response to respondents' complaints in spite of TCI Seattle management's notice of the illegal and egregious misconduct. (Respondents' App. at 2a, 4a, 11a, and 14a.) Finding the work environment unbearably hostile, all three respondents left the employ of TCI Media Services.

2. Respondents Filed With Both The EEOC and State/Local Agencies As Required To Bring Their Federal Causes of Action In District Court.

After Respondents left TCI Media Services, they each perfected their administrative claims to the EEOC in compliance with Title VII requirements.

Respondent Patricia Cole perfected her administrative claim of discrimination in both Idaho and Washington. She first submitted a charge of sexual discrimination, related to conduct by Wetten and Moore, to the EEOC and the Idaho State Human Rights Commission on a form dated November 15, 1997, setting forth discriminatory practices of Wetten and Moore. (Respondents' App. at 5a, 6a, and 7a.)

Pursuant to a worksharing agreement, the Charge was forwarded to the Idaho State Human Rights Commission and Cole was informed that the charge was to be initially investigated by the EEOC. (Respondents' App. at 8a, 9a.) Cole filed an amended claim with the EEOC adding an additional claim of age discrimination and further identifying discriminatory actions by the supervisory staff at the TCI Regional Office located in Seattle, Washington, and requested that the local Seattle agency be assigned this case. (Respondents' App. at 10a, 10b; and Petitioners' App. at 35a and 36a.) The claim was filed as a new Charge, given a different number and referred to the Seattle Office of Civil Rights.. (Petitioners' App. at 29a, 39a, and 40a.)

Respondent Cathy Leal filed her charge with the EEOC in the State of Washington describing discriminatory conduct in both in Boise, Idaho and in Seattle, Washington. Leal's charge was received by the EEOC on October 15, 1997. (Respondents' App. at 1a, 2a, 17a and 18a). Due to the worksharing agreement between the State of Washington and the EEOC, Leal's claim was co-filed with the local agency in Seattle that had the authority to resolve the matter, (here the Seattle Office of Civil Rights), as Penny Taylor, based at the TCI Great West Regional office was Wetten's immediate supervisor and had the power to stop the discriminatory conditions occurring at Boise, Idaho).

Likewise, Becki Trueblood filed her

charge with the EEOC in Seattle, Washington on October 15, 1997, also describing discriminatory conduct in both Idaho and Seattle, Washington. (Respondents' App. at 3a, 4a, 15a, and 16a.) That claim was also co- filed with the Seattle Office for Civil Rights.

All Respondents were issued right to sue letters and timely brought suit.

3. Respondents Sought Redress In A Proper Venue For Exhausting Their Administrative Claims.

In each of the initial charges sent by Respondents to the EEOC in Seattle, allegations were made, inter alia, against the supervisory personnel of TCI Media Services, located at TCI's Great Western Regional Office in Seattle, Washington. In opposition to Petitioners' Fact 24, and confirmed in Respondents' Additional Facts 50 and 51, it is clear that some of the charged discriminatory conduct had occurred in Seattle by the inaction and reckless indifference of Penny Taylor, Wetten's direct supervisor. (Respondents' App. at 12a, 13a and 14a.)

The EEOC was the designated Federal agency for both Idaho and Washington to initially investigate Title VII and ADEA violations. Regardless of where filed, Idaho or Washington, the EEOC would have been the agency to initially evaluate the claims. (See Petitioners' App. at 44a, 45a, and 46a.) The EEOC, knowing the charges of both Leal and Trueblood involved claims of discrimination in

both Seattle, Washington and in Boise, Idaho, and knowing Respondents lived in Boise, selected from its published list of local Fair Employment Practice Agencies, the Seattle Office of Civil Rights, as the appropriate State agency.[1] (Respondents' App. at 15a-17a and 18a.) Cole's charge of discrimination as to age and actions of Seattle management came later. She asked for the same agency that was assigned to Leal and Trueblood, and her claim was also properly filed in Seattle.

The Seattle Office of Civil Rights had jurisdiction over Respondents' claims. It had the power to investigate and authority to grant or seek relief from TCI's managers in Seattle who had immediate control over Petitioners pertaining to reports of violations of its policies and practices concerning to sexual harassment and gender and age discrimination. It had the power to investigate how Seattle based Penny Taylor, direct supervisor of Petitioner Wetten, personally responded to the claims she received about Wetten's and Moore's misconduct. The Company policies against discrimination that were at issue were not just applicable to TCI employees in the State of Idaho.

Respondents did not dispute that plaintiffs lived and worked in Idaho and the acts of discrimination by Wetten and Moore were done in Idaho [Fact No. 1 of Petitioners' Motion for Summary Judgment], the concluding

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[1] The list of local Fair Employment Practice Agencies also includes the Idaho State Human Rights Commission. (See, Petitioners' App. at 46a.)

line of that Fact only pertained to discrimination by Wetten and Moore, as defined by the context of the Fact. However, there was substantive evidence before the district court and the Ninth Circuit including the initial charges by each of the Respondents, (Petitioners' App. at 13a and 14a, Respondents' App. at 1a-4a, 10a and 11a) that showed that discriminatory actions were perpetuated and ratified by the Regional office management at TCI Media Services, located in Seattle, Washington.

4. Petitioners' Allegation that Respondents Instructed the EEOC To Forward Their Charges To A Local Agency With No Subject Matter Jurisdiction Is A Misstatement Of Fact As Is The Assertion That Respondents Failed to Allege Discriminatory Conduct In Their Administrative Charges.

To support Petitioners' assertion that Respondents knowingly had the EEOC send their charges to a local agency that had no authority to act, they, at Page 7 of the Petition, claim, as fact, that each of the Respondents drafted the forms shown at Appendix G-I, of the Petition. The assertion is false and a misstatement of fact.

The documents that make up those sections of the Appendix, were the Formal Charges, drafted by the EEOC after receiving Respondents' Initial Charges of Discrimination, to be sent to TCI in Seattle and TCI in Idaho.

(See, Respondents' App. 15a-17a, and 18a; and Petitioners' App. 39a and 40a.) Each of those letters from the EEOC show that the EEOC drafted the Charges and was sending them to the Respondents for signature.

Leal's and Trueblood's letters from the EEOC in said Appendix inform them of the local agency selected by the EEOC for referral, here the Seattle Office of Civil Rights. This evidence refutes and effectively dispenses with Petitioners assertions that it was respondents who directed the referral.

The EEOC obtained the information from the Respondent's initial charges, which show that Respondents lived in Boise, Idaho, and that discriminatory conduct occurred in both Boise, Idaho and Seattle, Washington. Nowhere on the form is there an allegation that Respondents worked in Seattle, Washington. The initial charges submitted to the EEOC shows Respondents working for Wetten, who was based in Boise, Idaho. To claim or imply that Respondents intentionally drafted a document (which they did not do), to show their primary employment as being in Seattle, in an alleged scheme to in essence "pull the wool over the eyes of the EEOC" is specious, at best, and, in reality, not supported by the evidence.

Moreover, Petitioners' claim that Respondents did not allege any discriminatory conduct in their EEOC charges is misleading. In the initial charging documents of Leal and Trueblood, which were not attached to the Petition but are attached hereto as

Respondents' Appendix 1a-4a, Respondents provided a description of examples of the improper and egregious misconduct by both Wetten and Moore in Boise, Idaho, and by the supervisory personnel in Seattle, Washington. Respondent Cole's amended charge also reflects discriminatory conduct of Seattle TCI management. (Petitioners' App. at 37a and 38a.)

Petitioners' claim, at Petition, pg. 7, fn 4, that Cole asked the EEOC to forward her ADEA charges to the local agency in Seattle, knowing that Idaho was the appropriate agency, is argument and not fact. When Cole amended the claim originally brought in Idaho, to assert age discrimination and discrimination by Seattle personnel, she requested that the same Washington local office handle her amended claim, as was handling Leal and Trueblood's claims.

B. Procedural History

Following the exhaustion of Respondents' administrative remedies, Respondents filed their complaint in the United States District Court for the Western District of Washington, on May 8, 1998. The case was voluntarily moved to the District Court in Boise, Idaho, by stipulation between the parties, without any finding or any admission concerning venue. Respondents further amended their complaint on November 2, 1998, retaining most of the causes of action of the original complaint. Causes of action for Title VII violations, ADEA (as to Cole only), Equal Pay, and various state

actions were alleged. The case then proceeded by way of discovery of all parties.

Petitioners filed a motion for summary judgment, on January 28, 2000, requesting dismissal of the case on multiple grounds, including that plaintiffs Leal and Trueblood never filed with a state or local agency with authority to grant or seek relief from such practice. The motion was silent as to the filings by Cole. Petitioners further asserted that all plaintiffs should have been required to allow the local agency the 60 days required to review the matter, using an arbitrary date later shown to be when the EEOC received the formal signed charges back from Respondents. (See Excerpt of Record (ER) 000017-000020). On Reply, Petitioners incorrectly asserted, for the first time, that Cole had not filed with any state agency. (See ER 001364-001367.)

Without hearing or affording oral argument, on May 18, 2000, the District Court for Idaho granted Petitioners' Motion for Summary Judgment as to Respondents' federal law claims based on statute of limitation grounds. The District Court ruled that as the result of an alleged failure to comply with the local administrative filing requirements, Respondents were entitled to only a 180 day period going back from December 16, 1997, in which to show discriminatory acts, instead of the 300 days Respondents maintain that they were entitled. (Petitioner's App. at 7a-16a.)

Recognizing that a manifest error had occurred, based on the ruling and reasoning of

the district court as to the administrative exhaustion of remedies, on May 26, 2000, Respondents requested reconsideration on several grounds (see, Memorandum of Points and Authorities in support of Motion for Reconsideration, Docket No. 96) but on July 19, 2000, the District Court for Idaho denied Respondents' Motion for Reconsideration of the District Court's May 18, 2000, order.

Petitioners timely filed their Notice of Appeal of both the Judgment on the Motion for Summary Judgment and the Order on the district court's ruling on Petitioners' Motion for Reconsideration.

Upon briefing by the parties and oral argument, the Ninth Circuit, reversed most of the judgment, affirming only the judgment on the Equal Pay cause of action, and remanded the case for further proceedings. The Ninth Circuit found that Respondents administrative filings in both Idaho and Washington were proper; all of the plaintiffs were entitled to the 300 day time period; and Respondents were therefore timely with their claims. It further found that the district court's dismissal of Leal's constructive discharge claim because Moore had left months before she quit was incorrect in that the court did not consider that Petitioner Wetten remained as supervisor on the job at the time of Leal's constructive discharge.

Petitioners sought a rehearing, en banc, which was denied, on June 5, 2002.

REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 sets forth the considerations that govern a granting of review on certiorari which will "be granted only for compelling reasons." Petitioners claim that Rule 10(a) and 10(c) apply in that the Ninth Circuit "decided an important question of federal law that has not been, but should be, settled by this Court or has decided a federal question in a way that conflicts with applicable decisions of this Court" or "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." (Petition at pg 10.) The Rule further states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

As explained below, Respondents assert that the Ninth Circuit Memorandum, at issue in this request, does not fall within either Supreme Ct. Rule 10(a) or 10(c).

I. THE NINTH CIRCUIT CORRECTLY APPLIED WELL SETTLED FEDERAL LAW IN ITS DE NOVO FINDING THAT RESPONDENTS EXHAUSTED THEIR ADMINISTRATIVE REMEDIES IN THE PROPER FORUM.

Petitioners allege that this case raises an important issue regarding the exhaustion of administrative remedies under Title VII and ADEA that has not been resolved by this Court.

Specifically, they claim that Respondents "forum shopped" when they filed their administrative claims in Washington, and selected a forum "that had no connection to any of the discriminatory conduct they alleged." (Petition at pgs 10 and 11.) The Petitioners go so far as to scoff at the Ninth Circuit's Memorandum by asserting it would have condoned Respondents exhausting their administrative claims in, by example, the State of Virginia. (Petition at pg 12.) To be sure, had Respondents selected (or even would have been allowed to select) Virginia as the local venue, then Petitioners might have had something to complain about. Respondents, however, did no such thing.

A. Respondents' Alleged Discriminatory Conduct by TCI Regional Management, Whose Offices Were In Seattle Washington.

Respondents Leal and Trueblood have always alleged that, in addition to the egregious behavior of Petitioners Wetten and Moore in Boise, Idaho, the supervisory personnel at the Seattle Regional office of TCI Media Services, Greater Northwest Region, also participated in discriminatory behavior, by ratifying Wetten and Moore's illegal behavior by their silent acquiescence, once they had knowledge of the wrongful behavior. (See Respondents' App. at 1a-4a.)[2] Accordingly, the

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[2]. Patti Cole, first filed her initial claim, regarding discriminatory behavior in Idaho only, with the EEOC and the Idaho Human Rights Commission. She later amended her claim to add a charge of age

State of Washington was a proper venue in which to exhaust respondent's administrative remedies and litigate the facts of this case.[3]

Clearly, the Ninth Circuit here did not condone the filing of administrative charges in a local jurisdiction completely unrelated to the discriminatory issues raised and without authority to provide a remedy for the claimant. Nor does its Memorandum hold or stand for the proposition that a complainant can perfect state or local administrative remedies in any location of their choosing without reference to the conduct alleged. The Ninth Circuit reviewed the record de novo, considered the arguments of the parties, including Petitioners' assertion that Respondents had filed state/local charges in the wrong forum, and found that: all Respondents had perfected their administrative remedies; filing in Idaho or Washington was proper; and each was entitled to the 300 day period that the district court denied them. On that basis, it reversed the district court's judgment. Nowhere is it required that an

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discrimination, as well as discrimination against the TCI Media Services management in Seattle, Washington, and asked that the matter be referred to the same local agency that the other plaintiffs, her former co-workers, had earlier been referred to by the EEOC. That request for an amended charge was made a second charge, which was referred to the Seattle Office of Civil Rights. (Petitioners' App. 39a, 39a.)

[3]. Respondents further maintained that Washington was a proper venue in which to bring the suit as they had a good faith belief that their employment records were kept in the Regional office, and they named TCI Media Services, Great Northwest Region, based in Seattle, Washington, as a defendant. (See, Plaintiff's Complaint, Docket No. 4.)

appellate court, in an unpublished Memorandum, cite to each and every point it considered in reaching its determination.

The selection of Washington as a place in which to raise the administrative claims was appropriate, based on the content of the claims.

B. Petitioners' Claim That The Ninth Circuit Impermissibly Expanded The Law Pertaining To Exhaustion Of Administrative Remedies Is Based On Faulty Premises.

Petitioners base their argument solely on their erroneous conclusion that: 1) Respondents intentionally directed the EEOC to send the charges to an agency that could not take any action; 2) the Seattle Office of Civil Rights had no power to investigate charges of discrimination in Seattle, which affected a subordinate in Idaho; and 3) the Ninth Circuit would not have found that objectionable because of its "extraordinarily permissive interpretation of Section 706(c) of Title VII and Section 14(b) of the ADEA. For the reasons set forth herein, none of these suppositions are valid.

1. Petitioners' Allegation That Respondents Intentionally Directed The EEOC To Send Charges To An Agency That Had No Authority To Act Is Factually Incorrect.

The basis for Petitioners Question rests on their assertion that Respondents somehow were able to direct the EEOC to send their

charges to a forum in which the agency would not be able to carry out its tasks, should it have decided to investigate the action. The evidence, however, is contrary to that assertion. The evidence shows that it was the EEOC that selected the local Fair Employment Practice agency for Leal and Trueblood. To argue that Cole's later request, that her amended charges identifying discriminatory conduct in Seattle be referred to the same local entity addressing her former co-workers' similar claims, is evidence that all Respondents engaged in an intentional ploy to have an administrative agency appointed without the power to process the claim is unreasonable and without merit.

Petitioners ignore that part of each plaintiffs' initial charge under oath was an assertion that the TCI Regional office, located in Seattle, Washington, had actively discriminated against each of them by having knowledge of the discrimination occurring in Boise, Idaho, and not taking any action, contrary to the terms of its own policies. Moreover, the Seattle based TCI Media Services, Great Northwest Region was named as a defendant in the complaint.

Petitioners' further assertion that the Idaho State Human Rights Commission was the only agency to have power, fails to acknowledge that the Seattle Office of Civil Rights surely could have approached Wetten's supervisor and raised the issue that Seattle was doing nothing to stop Wetten's discriminatory practices or protect plaintiffs from being

exposed to the discrimination and hostile environment pervasive at the Boise, Idaho office. It clearly had the authority to address discriminatory conduct being propagated by the TCI Media Services, Great Northwest Region management located in Seattle, Washington.

2. Petitioners Use This Forum To Argue For A Restriction Of Established Law.

Petitioners broadly argue that this Court requires strict compliance with the statutory provisions governing exhaustion of administrative remedies under Title VII and the ADEA. They further assert that this Court's recent ruling on the subject, National Railroad Passenger Corp. v. Morgan, 122 S. Ct. 2061 (2002) compels a tightening up on the procedural requirements for exhausting administrative remedies. Specifically, they argue that the law should require that claimants follow the literal law of the Title VII, requiring that state or local filing occur first and argue that the sixty day waiting period, and no less, should commence prior to a filing with the EEOC. Such narrow interpretation of the law will, according to Petitioners, prevent Circuits, such as the Ninth, from ignoring the rules.

That the Ninth Circuit found Respondents' administrative filings proper, however, is not at odds with the discussion in National Railroad Passenger Corp. v. Morgan

122 S. Ct. 2061 (2002).[4] That case, rather addressed when conduct outside the 300 day period could be used to show discriminatory conduct in Title VII actions. Although the case reviewed the law in relation to administrative filings, it did not deal with the location in which an administrative claim was to be filed or whether the time limits of 180 versus 300 days applied. It is the alleged lack of jurisdiction of the local agency where the EEOC referred the case, which brings this question to the Court.

The issue asserted here by Petitioners is whether the local agency had the authority to consider the claim. The Ninth Circuit ruled that it did.

3. Existing Law On Exhaustion of Administrative Remedies Was Followed By The Ninth Circuit In This Case.

Ordinarily, discrimination claims under Title VII (and ADEA) must be filed with the EEOC within 180 days of the date on which the allegedly discriminatory practice occurred. 42 U.S.C. Section 2000e-5(e)(1). If, however, the claimant "institutes proceedings" with a state agency that enforces its own discrimination laws – a "deferral" state – then the period for filing claims with the EEOC is extended to 300 days. Id.; see, 29 U.S.C. Section 626 (d)(2).

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[4]. Indeed, in seeking a stay on discovery in this case, Petitioners cited to *National Railroad* as being the new law on which defendants intended to seek a writ of certiorari to the Supreme Court. See, Docket No.124, 125.

Laquaglia v. Rio Hotel & Canino, Inc., 186 F.3d 1172, 1174 (9th Cir. 1999). Washington is a deferral state. Sanchez v. Pacific Powder Co.,147 F.3d 1097 (9th Cir. 1998). Nothing in the Ninth Circuit's Memorandum is contrary to this law.

This Court has clearly recognized the impact of administrative filings in deferral states, such as Washington and Idaho. In Equal Employment Opportunity Commission v. Commercial Office Products Company 486 U.S. 107, 1998), this Court, held that a state agency's decision to waive its exclusive 60 day period for initial processing of a discrimination charge, pursuant to a worksharing agreement with the EEOC, terminates the agency's proceedings within the meaning of section 706(c) of Title VII so that the EEOC immediately may deem the charge filed. The Court further held that a complainant who files a discrimination charge, untimely under state law, is still entitled to the extended 300-day federal filing period of section 706(e) of Title VII.

This Court further has previously denied writs of certiorari on Ninth Circuit cases wherein the court held that it was not necessary to file with the state agency first to be entitled to the 300 day limitation. See, Wilshire v. Standard Oil Co. of California, 652 F.2d 837, 842 (9th Cir. 1981), cert. denied, 455 U.S. 1034 (1982); Bouman v. Block, 940 F.2d 1211, 1220, (9th Cir. 1991), cert. denied, 550 U.S. 1005 (1991). In Bouman, the Ninth Circuit made it clear that it had previously rejected the

argument that the state proceedings must be instituted first to extend the limitation period. "Since the EEOC deferred jurisdiction to the state within 300 days, the extension period is triggered regardless of whether the complaint was first received by the EEOC or the state." Bouman, supra, 940 F.2d at 1220.

II. THE NINTH CIRCUIT'S DECISION IN THIS CASE IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER UNITED STATES COURTS OF APPEALS.

Petitioners claim that the Ninth Circuit's decision conflicts materially with three other Circuit cases, where the "charging parties were responsible for their own failure to exhaust their administrative remedies through an FEP agency with subject matter jurisdiction." (Petition at pg 18.) Petitioners' argument, however, is flawed.

A. Petitioners' Finding Of Conflict Is Flawed.

As noted herein, there was no "at fault" failure to exhaust proper administrative remedies. There was no conspiracy to file in a location, where Respondents knew their administrative remedies could not be satisfied. There was no attempt to "fool" the EEOC into thinking that Respondents worked for the Seattle office. The EEOC is the entity that initially selected the local agency, Seattle Office of Civil Rights, for Leal and Trueblood, on receipt of their initial charges. It further agreed to refer Cole's second (sought to be

amended) claim, dealing with Seattle based discrimination, to the same agency as Leal and Trueblood. In all likelihood, it would have made the same independent choice.

There was nothing "impermissible" in the Ninth Circuit's finding that Respondents' charges were properly filed with the EEOC in Seattle, Washington where one of the responding parties had its place of business, and where some of the discriminatory conduct by TCI Media Services occurred.

Petitioners' claim that the Ninth Circuit ignored the local agency is mere speculation. The Memorandum, at App. 2a to the Petition, states:

> We review the district court's holding that the claims are barred by the Title VII statute of limitations de novo. Santa Maria v. Pacific Bell, 202 F.3d 1170, 1175 (9th Cir. 2000). We find that all three appellants were entitled to the 300 day period. Appellants' filings of charges in Idaho and Washington were proper. See 20 C.F.R. §§ 1601.8 and 1626.5.

B. The Cases Cited By Petitioner As Conflicting Do Not Conflict With The Ninth Circuit Memorandum In This Case.

Cases cited by Petitioners to be contrary to the ruling of the Ninth Circuit, in this case are distinguishable. The two Fourth Circuit

cases involve either an absolute failure to file with a state or local agency, or a failure to take any action, when informed that state filing was erroneously made in another state.

Citicorp Person-To-Person Financial Corp. v. Brazell, 658 F.2d 232 (4th Cir. 1981), involved a plaintiff who informed the EEOC that she had filed state charges, or would file state charges and, in reality, never filed with the state. Plaintiff was clearly aware of the filing requirement with the state agency but did not for reasons, unexplained, file. Under those circumstances, she was not entitled to the 300 day period, and consequently was untimely with her complaint.

No allegation exists in Citicorp, as there was in this case before both the district court and the appellate court, that the local agency filing was in the wrong jurisdiction. In Citicorp, plaintiff simply did not file with the state agency. The legal basis set forth in the Ninth Circuit Memorandum would support the same finding that the Fourth Circuit made in Citicorp. Plaintiff in that case would also be found to be untimely with her claim by the Ninth Circuit legal analysis.

In Cornett v. AVCO Financial Services, One, Inc., 792 F.2d 447 (4th Cir 1986), the EEOC sent plaintiff's ADEA claim to California, AVCO's home office, instead of West Virginia, where plaintiff worked, based on the possibility of multi-state discrimination action. The EEOC investigated and the California Fair Employment Practice agency notified plaintiff

that they had received the complaint, and that he could bring suit in California. Instead, plaintiff brought suit in West Virginia, in spite of not asking for the EEOC to send the state charge there. The only issue in the case was whether the district court abused its discretion in not waiving or treating the state claim as tolled so that plaintiff could belatedly commence a proceeding in West Virginia. The appellate court found that the district court did not abuse its discretion to waive the state proceedings based on the filing in California instead of West Virginia because plaintiff, who had known of the California filing, did nothing for five years while defendants brought a motion to dismiss and a summary judgment motion, without taking any affirmative action to correct the problem. Too much time had passed, and it was concluded that plaintiff's inaction that caused the problem.

Like Citicorp, Cornett is also factually distinguishable. The Fourth Circuit decided whether the district court abused its discretion by failing to provide plaintiff a waiver or tolling the federal action until state proceedings could be filed. The appellate court found that because plaintiff knew that the EEOC sent the state claim to California instead of West Virginia for five years and did nothing to correct the matter, his own inaction caused the problem. Cornett did not file in the state where the state charges were perfected. He, instead, filed in another state.

Respondents, here, did bring suit in the State of Washington, where their administrative

claims were perfected. The first entity named in Respondents' complaint was the Washington based company, TCI Media Services, Great Northwest Region, of which Respondents claimed had discriminated against them. The Cornett case does not conflict with the Ninth Circuit Memorandum, as there was no issue of waiver or tolling addressed, nor was there a filing of the action in a venue where administrative remedies had not been perfected.

Likewise, Maynard v. Pneumatic Products Corp., 256 F.3d 1259 (11th Cir. 2001), does not address the issues addressed by the Ninth Circuit. In Maynard, plaintiff was terminated from his assembly line position, while on limited duty from a back injury, because the product his line worked on allegedly was being discontinued. Two hundred and ninety two days later, he for the first time submitted an affidavit to the EEOC claiming a violation of the American with Disabilities Act. Because the record on review with the appellate court contained no information regarding a worksharing agreement between the EEOC and the Florida Commission on Human Relations, the appellate court could not, therefore determine if the state agency had waived its right to a 60 day review within the eight remaining days of the 300 day period. If there was no waiver, the EEOC claim would be untimely.

Petitioners' complaint regarding administrative filings in this case does not deal with the timing of the state or local agency

waiver issue. Petitioners, herein claim that the wrong local agency was used as the local agency. Maynard, therefore deals with an issue unrelated to the instant case and therefore not instructive. Again, nothing in the Ninth Circuit Memorandum addresses this issue and therefore its Memorandum is not in conflict with the Eleventh Circuit.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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*Counsel of Record

October 4, 2002

DECLARATION OF CATHY LEAL
IN SUPPORT OF CHARGE OF DISCRIMINATION

I, CATHY LEAL, declare as follows:

1. My name is Cathy Leal.

2. My address and telephone number are as follows: 10655 Conway Avenue, Boise, Idaho, 83709; (208) 377-8456.

3. I am a female.

4. My date of birth is: November 12, 1960.

5. My Social Security Number is: 518-88-7188.

6. The company and individuals against whom this charge is made are: TCI Media Services, Great Northwest Region, located at 18 West Mercer, Suite 100, Seattle, Washington, 98119; Bruce Wetten, General Manager, at the TCI Media Services Boise office, located at 5475 Gage Street, Boise, Idaho, 83706; Edward Moore, former Team Leader at the TCI Media Services Boise office, current address unknown.

7. I am informed and believe that TCI Media Services employs in excess of 500 employees. TCI Media Services is a cable advertising business.

8. While employed at TCI Media Services, I held the position of Account Executive.

9. I am making the following charges: I was harassed, subjected to a hostile work environment forced to quit, constructively terminated, and denied promotion, benefits and equal pay because of my gender/sex.

10. I base these charges on the fact that during my employment with TCI Media Services, I experienced a hostile work environment, and harassing and abusive conduct,

including but not limited to: Moore would kiss me on the back of the neck and/or rub my legs while I was on the phone with clients; Moore would grab me from behind, physically restrain me, and kiss me on the neck or say "You know you want it"; Wetten and Moore referred to the female sales people in the office as "My bitches"; Wetten would call me at the office to tell me about erotic dreams he had about me; Wetten would tell me "Maybe there's a chance for us": Wetten would block my exit from his office in order continue to harass me. Lucrative sales accounts that rightfully belonged to me would be given to male account executives: I was denied a rightful promotion to senior account executive: I was denied a rightful promotion to team leader. Wetten would require meetings with just the two of us at a much higher frequency than he met with other employees and attempt to engage me in discussions about my personal life: regional management, including Penny Taylor and Kerin Brasch sanctioned such behavior and attitudes: TCI Media Services Northwest Region responded to my complaints with comments such as "Boys will be boys".

II. The last date of the above discrimination was October 1, 1997.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 10, 1997, at Boise, Idaho.

CATHY LEAL

DECLARATION OF BECKI TRUEBLOOD
IN SUPPORT OF CHARGE OF DISCRIMINATION

I, BECKI TRUEBLOOD, declare as follows:

1. My name is Becki Trueblood.

2. My address and telephone number are as follows: 3777 Newtown Road, Placerville, California, 95667.

3. I am a female

4. My date of birth is: April 26, 1963.

5. My Social Security Number is: 567-49-7304.

6. The company and individuals against whom this charge is made are: TCI Media Services, Great Northwest Region, located at 18 West Mercer, Suite 100, Seattle, Washington, 98119; and Bruce Wetten, General Manager, at the TCI Media Services Boise office, located at 5475 Gage Street, Boise, Idaho, 83706.

7. I am informed and believe that TCI Media Services employs in excess of 500 employees. TCI Media Services is a cable advertising business.

8. While employed at TCI Media Services, I held the position of Account Executive.

9. I am making the following charges: I was harassed, subjected to a hostile work environment forced to quit, constructively terminated, and denied promotion, benefits and equal pay because of my gender/sex.

10. I base these charges on the fact that during my employment with TCI Media Services, I experienced a hostile work environment, and harassing and abusive conduct, including but not limited to: Wetten referred to the female

sales people in the office as "My bitches"; Wetten would block my exit from his office in order to continue to harass me; Wetten informed me that I did not need to make as much as the men in the office, since I was "just a single woman"; Lucrative sales accounts that rightfully belonged to me would be given to male account executives; Regional management, including Penny Taylor and Kerin Brasch, sanctioned such behavior and attitudes.

11. The last date of the above discrimination was June 3, 1997.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 14. 1997, at Placerville, California

BECKI TRUEBLOOD

CHARGE OF DISCRIMINATLON
This form is affected by the Privacy Act of 1974;
See Privacy Act Statement before completing this form

AGENCY	CHARGE NUMBER
X EEOC	380980253

Idaho State Human Rights Commission and EEOC
State or local Agency, if any

NAME (Indicate Mr., Ms., Mrs.)
Ms. Patricia A. Cole

HOME TELEPHONE (Include Area code)
(208) 362-5555

CITY, STATE AND ZIP CODE
4878 Chinook Avenue, Boise. ID 83709

DATE OF BIRTH
01/23/54

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME
Tele-Communications, Inc.

NUMBER OF EMPLOYEES, MEMBERS
Cat A (15-100)

TELEPHONE NUMBER (Include Area Code)
(208) 375-8288

STREET ADDRESS CITY AND ZIP CODE
8400 Westpark, Boise. ID 83709

COUNTY
001

COURSE OF DISCRIMINATION BASED ON
(Check appropriate box(es))
X SEX

DATE DISCRIMINATION TOOK PLACE

EARLIEST	LATEST
07/08/96	04/04/97

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s)):
I began employment with the above-named respondent as an Account Executive on July 8, 1996. Beginning in my first month of employment, and thereafter, I was subjected in the workplace to foul and sexually explicit language, inappropriate touching, derogatory comments about my gender, and discrimination with reference to sales decisions and promotions.

I complained on numerous occasions to my supervisor about the sexual harassment, gender bias, and pervasive hostile work environment. My complaints were never addressed, and the problems never resolved. On April 4, 1997, I felt compelled to resign my position with this respondent in a constructive discharge, In order to escape the ongoing harassment and discrimination.

In all of the above particulars, I believe that respondent discriminated against me because of my gender, female, in violation of Title VII of the Civil Rights Act of 1964, as amended.

I declare under penalty of perjury that the foregoing is true and correct.

Date 11/15/97

Charging Party (Signature)

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year)
11/15/97

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Idaho State Human Rights Commission
1109 Main Street, Suite 400
P0 Box 83720
Boise, ID 83720-0040

DATE 12/19/97
EEOC CHARGE 380980253
FEPA CHARGE

SUBJECT: CHARGE TRANSMITTAL

Cole, Patricia A. v. Tele-Communications, Inc.
(Charging Party) (Respondent)

Transmitted herewith is a charge of employment discrimination initially received by the:
X EEOC on 12/10/97
(Date of Receipt)

X Pursuant to the worksharing agreement, this Charge is to be initially investigated by the EEOC.

Please complete the bottom portion of this form to acknowledge receipt of the charge and, where appropriate, to indicate whether the Agency will initially investigate the charge.

TYPEDNAME OF EEOC OR FEPA DIRECTOR
Jeanette M. Leino

SIGNATURE

Cole, Patricia A. v. Tele-Communications, Inc.
(Charging Party) (Respondent)

TYPED NAME OF EEOC OR FEPA
Marilyn Shuler Director

TO: Equal Employment Opportunity Comm
909 First Avenue, Suite 400
Seattle, WA 98104-1061

EEOC CHARGE 380980253

DECLARATION OF PATRICIA A. COLE
IN SUPPORT OF CHARGE OF DISCRIMINATION

I, PATRICIA A. COLE, declare as follows:

1. My name is Patricia A. Cole.

2. My address and telephone number are as follows: 4878 Chinook Avenue, Boise, ID 83709, (208) 362-5555.

3. I am a female.

4. My date of birth is: 1/23/54.

5. My Social Security Number is: 553-84-6334.

6. The company and individuals against whom this charge is made are: TCI Media Services, Great Northwest Region, located at 18 West Mercer, Suite 100, Seattle, Washington, 98119; Bruce Wetten, General Manager, at the TCI Media Services Boise office, located at 5475 Gage Street, Boise, Idaho, 83706; Edward Moore, former Team Leader at the TCI Media Services Boise office, current address unknown.

7. I am informed and believe that TCI Media Services employs in excess of 500 employees. TCI Media Services is a cable advertising business.

8. While employed at TCI Media Services, I held the position of Account Executive.

9. I was employed at TCI Media Services from July 8, 1996, to April 4, 1997.

10. I am making the following charges: I was harassed, subjected to a hostile work environment forced to quit, constructively terminated, and denied promotion, benefits and equal pay

because of my gender/sex and age.

11. I request that the EEOC also file this charge with the Seattle Office for Civil Rights.

12. I base these charges on the fact that during my employment with TCI Media Services, [experienced a hostile work environment, and harassing and abusive conduct, including but not limited to: Moore would touch me in an inappropriate manner, rubbing my shoulders and chest; Moore would grab mc from behind, physically restrain me, and mock intercourse; Wetten and Moore referred to the female sales people in the office as "My bitches" or "bitches"; Wetten responded to my complaints about Moore by saying that Moore was "harmless": Moore would derogatorily comment on my age: I did not receive compensation comparable to similarly situated males: I was denied a rightful promotion to senior account executive: Lucrative sales accounts that rightfully belonged to me would be given to male account executives: regional management including Penny Taylor and Kerin Brasch, sanctioned such behavior and attitudes.

13. The last date of the above discrimination was April 4, 1997.

I declare under penalty of perjury under the laws of the State of Idaho that the foregoing is true and correct.

Executed on December 31, 1997, at Boise, Idaho

PATRICIA A. COLE

KENNETH D. SIMONCINI,
MARILYNN J. WINTERS
SIMONCINI & ASSOCIATE
1694 The Alameda
San Jose, California 95126-2219
Telephone: (408) 280-7711
Facsimile: (408) 280-1330

GRANT T. BURGOYNE
MAUK & BURGOYNE
515 So. 6th Street
P 0 Box 1743
Boise, Idaho 9370 1-1743
Telephone: (208) 345-2654
Facsimile: (208) 345-2668

Attorneys for Plaintiffs

Case No. 98-CV-342

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

PATRICIA A. COLE, CATHY LEAL, and BECKI TRUEBLOOD,
Plaintiffs,

v.

TCI MEDIA SERVICES, GREAT NORTHWEST REGION, an entity of unknown type; TCI MEDIA SERVICES, BOISE, an entity of unknown type; UNITED CABLE TELEVISION CORP., a Delaware corporation; TCI COMMUNICATIONS INC., a Delaware corporation; BRUCE WETTEN, an individual; and EDWARD MOORE, an individual,
Defendants.

PLAINTIFFS' STATEMENT OF DISPUTED FACTS AND ADDITIONAL MATERIAL FACTS IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

DEFENDANT MATERIAL FACTS

PLAINTIFF'S DISPUTED FACTS AND ADDITIONAL FACTS IN DISPUTE

***

24. None of the three Plaintiffs properly followed TCI's sexual harassment reporting policy as set out in Deposition Exhibits 9 and 11.

24. Disputed. Nancy Poindexter Bales received a complaint from Leal regarding Moore's conduct. (Bales at 31:24-33:24.) Becky Bradburn recalled speaking with LEAL about MOORE's behavior. (Bradburn at 49:2-50:17.) Leal reported the conduct of Moore to Bruce Wetten (Leal at 182:12-183:13; 186:5-13; 190:8-15; Defendants Exhibits 38, 39, 41.);Kerin Brasch, Regional Sales Manager, (Leal at 56:1-60:10;69:1 77:25; 78:6-79:5; 94:18-95:3; 95:4-18.) and tried to report it to Robyn Horowitz and Mark Duke, both with Employee Relations (Leal at 93:1-93:11; 216:2-5; 217:1-23.) Kerin Brasch confirmed that Leal had spoken to her about Moore's inappropriate conduct. (Brasch at 80:18-82:9.) Brasch also reported the matter to Penny Taylor, Wetten's supervisor, who was going to speak with Wetten. (Brasch at 120:2-21.) Cole reported Moore's behaviors to Wetten during the course of her employment at TCI and when she left TCI. (Cole at 18:3-14; 28:7:29:5;.) She did not go over Wetten's head to report Moore's behavior as she had witnessed what happened to another employee who had complained about Moore's behavior. (Cole at 29:12-24.) Trueblood told Wetten that Moore's conduct would get him into trouble some day. Wetten agreed with her and said he had spoken with Moore in that regard. (Trueblood at 121:2-23.)

Leal spoke about Wetten's discriminatory practices regarding women with Penny Taylor, Regional Vice President (Leal at 82:11-25.); with Kerin Brasch (Leal at 69:1-77:25; 241:5-25.)

***

50. WETTEN knew of the inappropriate behavior of MOORE. Wetten at 138:18-139:17; 142:22-143:23; 603:2-605:16.

51. Specifically, WETTEN did not inform either his direct supervisor, Penny Taylor or any one from Human Resources/Employee Relations, as was required by TCI policy. Wetten at 596:8-599:11 Taylor at 137:3-8;137:9-16. Duke at 87:24-89:25; 90:1-12; and 97:7-98:1. Brasch at 124:5-125:6.

Equal Employment Opportunity Commission

Equal Employment Opportunity Comm
909 First Avenue Suite 400
Seattle, WA 94104-1061

Respondent: TCI Media Services, Great N W Reg
Charge No:

October 15, 1997

Ms. Becki Trueblood
C/O Kenneth D. Simoncini, Atty
1694 The Alameda
San Jose, CA 95126-2219

Dear Ms. Trueblood:
This is with reference to your recent telephone call/mail inquiry in which you alleged employment discrimination by the above named respondent. The information you have provided indicates that the matter you complain of may be a violation of one or more of the following laws:

[X] Title VII or the Civil Rights Act of 1964 (Title VII)

[X] The Equal Pay Act (EPA)

The attached EEOC Form 5, Charge of Discrimination, was drafted as a result of the information you provided. To facilitate proper handling of this action by the Commission you should:

[1] Review the enclosed charge form and make corrections.

[2] Sign and date the charge in the bottom left hand block where I have made an "X". The date of your signature on the charge will not affect the jurisdiction date established in your original written complaint to EEOC.

[3] Return the signed charge to this office in the enclosed

postage paid envelope.

Since a charge should be processed within the time limitation imposed by law, I urge you to complete these steps as soon as possible. Please call me at (206) 220-6883 if you have any questions.

The paragraph(s) checked below apply to your case:

[X] You should be aware that the Commission will provide a copy of your charge to the below listed agency in accordance with our procedures. If your charge is processed by that agency, you may be required to swear to or affirm your signature before a notary public or an official of the agency. Agency: Seattle Office for Civil Rights

[X] If your charge is investigated by the above agency, they will investigate and resolve your charge under their statute. Under section 1601.76 of EEOC's regulations, you are entitled to request that EEOC perform a Substantial Weight Review of the agency's final finding. To secure this review, you must request it in writing to this office within 15 days of your receipt of the agency's final finding in your case. Otherwise, we will generally adopt the agency's finding as EEOC's.

Sincerely,
Phillip R. Clower
Intake Supervisor

Equal Employment Opportunity Commission

Equal Employment Opportunity Comm
909 First Avenue Suite 400
Seattle, WA 98104-1061

October 15, 1997

Respondent: TCI Media Services
Charge No.:

Ms. Cathy Leal
C/O Kenneth D. Simoncini, Atty
1694 The Alameda
San Jose, CA 95126-2219

Dear Ms. Leal:

This is with reference to your recent telephone call/mail inquiry in which you alleged employment discrimination by the above named respondent. The information you have provided indicates that the matter you complain of may be a violation of one or more of the following laws:

[X] Title VII of the Civil Rights Act of 1964 (Title VII)

[X] The Equal Pay Act (EPA)

The attached EEOC Form 5. Charge of Discrimination. was drafted as a result of the information you provided. To facilitate proper handling of this action by the Commission you should:

[1] Review the enclosed charge form and make corrections

[2] Sign and date the charge in the bottom left hand block where I have made an "X". The date of your signature on the charge will not affect the jurisdiction date established in your original written complaint to EEOC.

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The paragraph(s) checked below apply to your case:

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[X] If your charge is investigated by the above agency, they will investigate and resolve your charge under their statute. Under section 1601.76 of EEOC's regulations, you are entitled to request that EEOC perform a Substantial Weight Review of the agency's final finding. To secure this review, you must request it in writing to this office within 15 days of your receipt of the agency's final finding in your case. Otherwise, we will generally adopt the agency's finding as EEOC's.

Sincerely,
Phillip R. Clower
Intake Supervisor

Supreme Court, U.S.
FILED
OCT 22 2002
OFFICE OF THE CLERK

(3)

No. 02-333

IN THE

Supreme Court of the United States

TCI MEDIA SERVICES, GREAT NORTHWEST REGION, an entity of unknown type; TCI MEDIA SERVICES, BOISE, an entity of unknown type; UNITED CABLE TELEVISION CORP., a Delaware corporation; TCI COMMUNICATIONS, INC., a Delaware corporation; TELE-COMMUNICATIONS, INC., a Delaware corporation; BRUCE WETTEN, an individual; and EDWARD MOORE, an individual,

Petitioners,

v.

PATRICIA A. COLE; CATHY LEAL; and BECKI TRUEBLOOD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JAMES N. WESTWOOD *
HARRY S. CHANDLER
GREGORY C. TOLLEFSON
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Counsel for Petitioners

October 22, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

1 1 PP

CORPORATE DISCLOSURE STATEMENT

Petitioners refer and incorporate their prior Corporate Disclosure Statement at page iii of the Petition for Writ of Certiorari.

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IN THE

Supreme Court of the United States

No. 02-333

TCI MEDIA SERVICES, GREAT NORTHWEST REGION, an entity of unknown type; TCI MEDIA SERVICES, BOISE, an entity of unknown type; UNITED CABLE TELEVISION CORP., a Delaware corporation; TCI COMMUNICATIONS, INC., a Delaware corporation; TELE-COMMUNICATIONS, INC., a Delaware corporation; BRUCE WETTEN, an individual; and EDWARD MOORE, an individual,

Petitioners,

v.

PATRICIA A. COLE; CATHY LEAL; and BECKI TRUEBLOOD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Respondents, plaintiffs below, argue that two issues of fact preclude a writ of certiorari. This Reply shows that the material facts are undisputed.[1]

[1] Respondents' Brief was due on October 4, 2002. Petitioners did not receive Respondents' Brief until October 11, 2002, and the only proof of service Respondents have been given is an Amended Proof of Service, which reflects a service date of October 7, 2002.

A. By and Through Their Attorneys, Plaintiffs Directed the EEOC to Defer Their Charges to the Seattle Office for Civil Rights

Plaintiffs argue that they did not direct the Equal Employment Opportunity Commission ("EEOC") to defer their charges to the Seattle Office for Civil Rights ("Seattle OCR"). Plaintiffs say the charge forms in the Petition's Appendix (*see* Apps. G-I; 27a-29a) were drafted by the EEOC; that the EEOC deferred to the Seattle OCR and plaintiffs had nothing to do with that decision. The record contains undisputed proof that plaintiffs, by and through their attorneys, directed the EEOC to defer their charges to the Seattle OCR.

1. Admissions of Plaintiffs' Counsel

Plaintiffs' counsel has admitted that his office filled out the charge forms, including specifically the request for deferral to the Seattle OCR. For example, at plaintiff Cathy Leal's deposition, she was handed her signed charge form, Deposition Exhibit No. 15 (ER 001611):[2]

> Q This indicates at the top that it was also filed with the Seattle Office for Civil Rights.
>
> Why, if you know, was it filed with the Seattle Office for Civil Rights?
>
> MR. SIMONCINI: I object. It is beyond this witness's expertise. *Her attorneys filed this.* She signed and *we filled it out.*

(1sa,[3] Deposition of Cathy Leal at 151, District Court CR 47, Affidavit of Gregory C. Tollefson in Support of Motion for Summary Judgment ("Tollefson Aff."), Exh. C at 39 (emphasis added).)

---

[2] (*Cf.* 27a, App. G to the Petition, Leal's charge form with "Received" stamp from EEOC.)

[3] All "__sa" references herein are to the Supplemental Appendix to this Reply.

Plaintiffs' counsel made the same representation when plaintiff Becki Trueblood was presented with her signed charge form, Deposition Exhibit 173 (ER 001616):[4]

> Q And this appears to be a charge of discrimination that was to be filed with the EEOC and the Seattle Office for Civil Rights?
>
> MR. SIMONCINI: I'm going to object. It's a legal document *filled out by her lawyers* filed on her behalf. Ms. Trueblood was requested to sign it which she did at the instructions of her Counsel. She has no knowledge as to the content nor did she participate in writing any of the content.

(3sa, Deposition of Becki Trueblood at 72, Tollefson Aff., Exh. D at 19 (emphasis added).)[5]

Of equal relevance is plaintiff counsel's December 31, 1997 letter to the EEOC on behalf of plaintiff Patricia Cole, which states: "We also request that the charge also be filed with the Seattle Office for Civil Rights, and not the Idaho State Human Rights Commission." (36a, App. M of the Petition's Appendix.)

2. Admission in Ninth Circuit Briefing

In their Opening Brief, plaintiffs told the Ninth Circuit that they chose to defer to the Seattle OCR: "*Appellants filed both local (Seattle Office of Civil Rights)* and federal (EEOC) *administrative claims* against [Respondents]. . . ." (Appel-

---

[4] (28a, App. H to the Petition.)

[5] The EEOC form letters cited at 15a–18a in the Appendix to Respondents' Brief state that the charges were "drafted as a result of the information you provided." Such boilerplate language is used because, as the letters indicate, the charge can be prepared based on a "telephone call/mail inquiry." (*Id.*)

lants' Opening Brief, filed with the Ninth Circuit on April 18, 2001 ("Appellants' Opening Brief"), at 6 (emphasis added).)[6]

3. Plaintiffs Failed to Inform the EEOC that Deferral to the Seattle OCR Was Incorrect

Even if plaintiffs had not directed the EEOC to defer to the Seattle OCR, plaintiffs were represented at all relevant times by counsel who knew or should have known that the proper agency for deferral was the Idaho Human Rights Commission. The EEOC form letters cited by plaintiffs state that the attached charge form is based on "information you provided." (*See e.g.*, Appendix to Respondents' Brief at 17a.) Because plaintiffs' attorneys never informed the EEOC that it had deferred to the wrong local agency, plaintiffs are responsible for failing to exhaust their administrative remedies, and their charges were thus never "filed" with the EEOC. *See Cornett v. AVCO Financial Services*, 792 F.2d 447 (4th Cir. 1986) (ADEA claim dismissed for failure to exhaust administrative remedies where EEOC mistakenly forwarded charges to wrong FEP agency, and plaintiff had notice but failed to correct the error).

B. The Seattle OCR Had No Jurisdiction

Plaintiffs' second contention is that the Seattle OCR had jurisdiction to investigate their claims and exhaust their administrative remedies.[7] The undisputed facts show that the Seattle OCR had no jurisdiction.

Plaintiffs make two arguments. First, they claim their supervisor in Idaho (Bruce Wetton) failed to report discriminatory conduct to his supervisor in Seattle. (Respondents'

---

[6] All parenthetical text from this quote, including the reference to the "(Seattle Office of Civil Rights)" is in plaintiffs' original.

[7] *See* 42 U.S.C. § 2000e-5(c) (Title VII) and 29 U.S.C. § 633(b) (Age Discrimination in Employment Act).

Brief at 2-3.) Second, plaintiffs say they reported discrimination to Seattle supervisors Kerin Brasch and Penny Taylor, who then allegedly failed to take action. (*Id.*) Even if true, these allegations fail to show the Seattle OCR had jurisdiction.

1. Plaintiffs' Charges and Claims Are Not Based on Any Acts or Omissions in Seattle

Plaintiffs unequivocally admitted below that they were asserting no charges or claims based on acts or omissions by Seattle office personnel:

> "All Plaintiffs have conceded that their entire employment with TCI Media Services took place in Idaho, that they were hired and employed for the entire duration of their employment in the Boise, Idaho office, that they were never employed in Washington or any other state. (Ex. 26 at Responses 2-4) Consequently, *all of the alleged claims in the Complaint and in Plaintiffs' EEOC charges were based entirely on acts that took place in Idaho if they occurred anywhere.*

(24a, App. F to the Petition, Paragraph No. 1 of Defendants' Statement of Material Facts, filed January 28, 2000 (emphasis added).) Respondents' Brief repeatedly refers to what plaintiffs construe as the Seattle office's ratification of Idaho discrimination or failure to act on reports of discrimination in Idaho. What they fail to explain, however, is how any of this is relevant, given their unqualified admission that "all" of their claims and charges were based "entirely on acts that took place in Idaho." (*Id.*) Given that admission, any acts or omissions within the Seattle office are immaterial.

Plaintiffs' intent to base their charges solely on Idaho conduct is further demonstrated by the previously noted

explanation they gave the Ninth Circuit for deferring to the Seattle OCR, which has nothing to do with any conduct or inaction by Seattle supervisors:

> Appellants filed both local (Seattle Office of Civil Rights) and federal (EEOC) administrative claims against TCI Media Services, Bruce Wetten and Edward Moore, with the State of Washington as they had a good faith belief that relevant employment records were maintained and administered at TCI Media Services, Great Northwest Region, located in Seattle, Washington. (ER 282-284, 538-541, 928, 935-36.)

(Appellants' Opening Brief at 6.)[8]

As to Wetten, plaintiffs' argument relies not on discriminatory actions in Seattle, but rather on omissions in Idaho. Any actionable failure of Wetten to report discrimination to Seattle was an omission that took place *in Idaho*. The Fair Employment Practices Ordinances in the Seattle Municipal Code ("SMC") do not apply to someone located *in Idaho* who fails to report allegedly discriminatory actions that took place *in Idaho*. *See* SMC § 14.04.040 ("It is unfair employment practice *within the City* for any: . . . Employer to discriminate against any person with respect to . . . .") (emphasis added); and SMC § 14.04.060 (". . . The Office for Civil Rights shall receive, investigate, and pass upon charges alleging unfair practices *as defined by this chapter* . . . .") (emphasis added). Respondents' Brief ignores the applicable provisions of the SMC.

Plaintiffs argue the Seattle OCR had authority to investigate how Seattle supervisors Taylor and Brasch "personally responded" to reports they allegedly received from plaintiffs of discrimination in Idaho. (Respondents' Brief at 6.) Unfair employment practices by a "person" under SMC

---

[8] Plaintiffs' employment records were not kept in Seattle, of course, but in Idaho where they were employed.

§ 14.04.040(I) are defined in terms of intentional misconduct in the form of affirmative actions, not negligent omissions.[9] Furthermore, plaintiffs ignore SMC § 14.04.040, which limits the scope of prohibited "unfair employment practice[s]" to those "within the City[.]" The alleged failure of Brasch and Taylor to take action *in Idaho*, to remedy discrimination *in Idaho*, does not constitute an "unfair employment practice" under the SMC. The Seattle OCR, therefore, had no "authority to grant or seek relief" from the discrimination alleged, which took place entirely in Idaho. 42 U.S.C.A. § 2000e-5(c); 29 U.S.C.A. § 633(b).

---

[9] SMC § 14.04.040(I) provides in relevant part:

It is an unfair employment practice within the City for any:

. . . . .

I. Person to:

1. Knowingly an willfully aid, abet, initiate, compel or coerce the doing of any act declared in this chapter to be an unfair employment practice; . . . .
2. Obstruct or prevent any person from complying with the provisions of this chapter,
3. Attempt directly or indirectly to commit any act declared by this section to be an unfair employment practice.

CONCLUSION

Petitioners respectfully urge the Court to grant their Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully Submitted,

JAMES N. WESTWOOD *
HARRY S. CHANDLER
GREGORY C. TOLLEFSON
SCOTT E. CRAWFORD
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204-1268
(503) 224-3380

* Counsel of Record

Counsel for Petitioners

October 22, 2002

SUPPLEMENTAL APPENDICES

SUPPLEMENTAL APPENDIX A

DEPOSITION OF CATHY LEAL
TAKEN ON JULY 28, 1999

COLE, *et al.*,

v.

TCI MEDIA SERVICES, *et al.*

---

* * * *

[Page 151] Q And what was her job?

A She was in production.

(Whereupon, Deposition Exhibit No. 15 was marked for identification.)

BY MR. CHANDLER:

Q I have handed you Deposition Exhibit 15.

Is that your signature down at the bottom left-hand corner?

A Yes, it is.

Q And the date appears to be November 8 of 1997. Do you recall that being about the time you signed this?

A I believe so.

Q Were you living in Idaho at that time?

A Yes.

Q This indicates at the top that it was also filed with the Seattle Office for Civil Rights.

Why, if you know, was it filed with the Seattle Office for Civil Rights?

MR. SIMONCINI: I object. It is beyond this witness's expertise. Her attorneys filed this. She signed and we filled it out.

BY MR. CHANDLER:

Q Do you know why it was filed with Seattle?

[Page 152] MR. SIMONCINI: Do you have an independent recollection as to why it was filed in Seattle?

THE WITNESS: No.

BY MR. CHANDLER:

Q And do you know why the Seattle address for TCI was used rather than—well, I'll withdraw that question. Why did you not file a charge with the Idaho Human Rights Commission?

MR. SIMONCINI: I'm going to object. It is beyond the scope of this witness's expertise. Her attorneys made the determination of where to file. If you have independent recollection, tell him.

THE WITNESS: No.

BY MR. CHANDLER:

Q Did you file any earlier charges against TCI either with the EEOC or with the State of Idaho?

A No. Not that I'm aware of.

Q Then the second page appears to be a declaration. Did you sign that second page in conjunction with the filing with the EEOC?

MR. SIMONCINI: Objection. Beyond the scope of this witness's expertise. Do you know if you did it in conjunction

* * * *

SUPPLEMENTAL APPENDIX B

BECKI TRUEBLOOD

COLE, *et al.*,

v.

TCI MEDIA SERVICES, *et al.*

1-12-00

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* * * *

[Page 72] Q Did you tell him anything about Fisher's—

A No.

Q —Office Supplies?

A No.

Q Was Fisher's Office Supply an account that you handled for TCI?

A No.

Q Did somebody else handle it?

A I'm sure they did. I don't remember who.

(Deposition Exhibit 173 was marked for identification.)

Q (By MR. CHANDLER) Exhibit 173, is that your signature at the bottom of that?

A Yes.

Q And this appears to be a charge of discrimination that was to be filed with EEOC and the Seattle Office for Civil Rights?

MR. SIMONCINI: I'm going to object. It's a legal document filled out by her lawyers filed on her behalf. Ms. Trueblood was requested to sign it which she did at the instructions of her Counsel. She has no knowledge as to the content nor did she participate in writing any of the content.

Q (By MR. CHANDLER) Ms. Trueblood, did you read the paragraphs in the middle of that form before you [Page 73] signed it?

A I don't recall.

Q Do you remember whether anything was completed in that section, or did you sign it in blank?

A I don't recall. I'm sorry, I don't.

Q During the time that you worked for TCI, did you work in the State of Washington at all?

A During—excuse me?

Q During the time that you were employed by TCI, did you work in the State of Washington?

A No.

Q Working for TCI.

A Right. I handled accounts that were based there, but I didn't work in the State of Idaho.

Q Excuse me?

A Actually that's not true. Forget I said what I just said.

Q Well, you said something—

A You can't say that because—okay.

Q Well, you said something about handling accounts.

A What I meant by that was, we never knew exactly where the base was of some of the accounts. Like, say, QZAR was my account. The headquarters of QZAR could have been in Washington, that type of thing.

* * * *